# DOCKET

EDITOR'S NOTE

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No. 86-6284-CSY
Status: GRANTED
CAPITAL CASE

Title: John T. Satterwhite, Petitioner
v.
Texas

Docketed:
January 30, 1987

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Satterwhite,John T.

Counsel for respondent: Palmer,Charles A.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jan 30 1987 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 3 | Jan 30 1987 | | Application for stay of execution filed (A-571), and order granting same by White, J., with order. |
| 5 | Mar 2 1987 | | Order extending time to file response to petition until April 3, 1987. |
| 6 | May 5 1987 | | Brief of respondent Texas in opposition filed. |
| 7 | May 13 1987 | | DISTRIBUTED. May 28, 1987 |
| 9 | Jun 1 1987 | | Petition GRANTED. limited to Question 1 presented by the petition. |
| | | | ********** |
| 10 | Jun 29 1987 | G | Motion of petitioner for appointment of counsel filed. |
| 11 | Jul 13 1987 | | Joint appendix filed. |
| 14 | Jul 14 1987 | | DISTRIBUTED. Sept. 28, 1987. (Motion for appointment of counsel). |
| 13 | Jul 15 1987 | | Order extending time to file brief of petitioner on the merits until July 24, 1987. |
| 19 | Jul 22 1987 | | Brief of petitioner John T. Satterwhite filed. |
| 15 | Jul 24 1987 | | Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed. |
| 16 | Jul 29 1987 | | Record filed. |
| 17 | Jul 30 1987 | D | Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as amicus curiae, out-of-time, filed. |
| 18 | Aug 1 1987 | D | Motion of petitioner for divided argument to permit amicus curiae NAACP Legal Defense and Educational Fund, Inc. to present oral argument filed. |
| 21 | Aug 14 1987 | | Order extending time to file brief of respondent on the merits until September 18, 1987. |
| 25 | Sep 18 1987 | | Order further extending time to file brief of respondent on the merits until September 25, 1987. |
| 23 | Sep 21 1987 | | Motion of petitioner for divided argument to permit amicus curiae NAACP Legal Defense and Educational Fund, Inc. to present oral argument DENIED. |
| 24 | Sep 21 1987 | | Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as amicus curiae, out-of-time, DENIED. |
| 26 | Sep 25 1987 | | Brief of respondent Texas filed. |
| 27 | Oct 5 1987 | | Motion for appointment of counsel GRANTED and it is ordered that Richard D. Woods, Esquire, of San Antonio, Texas, is appointed to serve as counsel for the |

No. 86-6284-CSY

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| | | | petitioner in this case. |
| 28 | Oct 9 1987 | | SET FOR ARGUMENT. Tuesday, December 8, 1987. (3rd case). |
| 29 | Oct 30 1987 | | CIRCULATED. |
| 30 | Dec 8 1987 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

86-6284

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A. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1987

* * * * * * * *

JOHN T. SATTERWHITE,

PETITIONER

VS

THE STATE OF TEXAS,

RESPONDENT

* * * * * * * *

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

* * * * * * * *

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ATTORNEYS FOR PETITIONER

## QUESTIONS PRESENTED FOR REVIEW

1. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR AND IMPARTIAL TRAIL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT ALLOWED WITNESS, JAMES GRIGSON, M.D. TO TESTIFY TO EVIDENCE OBTAINED IN VIOLATION OF ARTICLE I, SECTION 10, OF THE TEXAS CONSTITUTION AND IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

2. THE STATE OF TEXAS HAS APPLIED ITS CAPITAL STATUTE IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY PATTERN REFLECTING A SYSTEMATIC BIAS OF DEATH-SENTENCING OUTCOMES AGAINST BLACK AND MINORITY DEFENDANTS AND THOSE DEFENDANTS WHOSE VICTIMS ARE WHITE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.



## LIST OF PARTIES

The parties to this case are:

1. the Petitioner, and
2. the State of Texas.

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IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1987

* * * * * * * *

JOHN T. SATTERWHITE,
PETITIONER

VS

THE STATE OF TEXAS,
RESPONDENT

* * * * * * * *

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

* * * * * * * *

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals is unreported. A copy of the opinion is attached as Appendix A.

JURISDICTION

The judgment sought to be reviewed is that of the Court of Criminal Appeals in John T. Satterwhite v. The State of Texas, (No. 67220 Tex. Cr. App. 1986). On December 3, 1986, the Court of Criminal Appeals of Texas by written opinion affirmed petitioner's conviction and denying motion for rehearing. On February 2, 1987 the time for filing a petition for writ of certiorari will expire. On December 19, 1986 the mandate of the Court of Criminal Appeals issued, and petitioner was sentenced by the trial court to death before sunrise on February 17, 1987.

Petitioner, JOHN T. SATTERWHITE, prays that an order be entered pursuant to Rule 20.1 of the Supreme Court Rules, granting

him leave to file a petition for writ of certiorari in the Supreme Court of the United States to review the final judgment of the highest court of the State of Texas concerning the constitutional issues raised by petitioner in his application.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

After a jury trial in the 175th Judicial District Court of Bexar County, Texas, petitioner was found guilty of capital murder and was sentenced to death pursuant to Sec. 19.03, Vernon's Tex. Codes Ann., Penal Code Ann. In this petition he lists and discusses two separate reasons for granting this writ.

Petitioner was convicted of capital murder. Upon the jury's findings that the killing was deliberate and that petitioner represents a continuing threat to society, punishment was assessed at death. Petitioner's counsel appealed to the Court of Criminal Appeals of Texas claiming, amoung other grounds, that his conviction and sentence were illegally imposed on the ground that

"The accomplice witness testimony is not independently corroborated concerning the appellant's involvment in the commission of the offense as to that element which elevates the murder to capital murder."

QUESTIONS PRESENTED FOR REVIEW

I.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR AND IMPARTIAL TRIAL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW



AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION BECAUSE THE TRIAL COURT ALLOWED WITNESS, JAMES GRIGSON, M.D. TO TESTIFY TO EVIDENCE OBTAINED IN VIOLATION OF ARTICLE I, SECTION 10, OF THE TEXAS CONSTITUTION AND IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT AND AUTHORITIES

Despite the Court's majority opinion, Appellant moved to exclude all testimony of such witnesses on issue of expert testimony as it relates to future conduct. During the testimony of DR. SCHROEDER and DR. GRIGSON, objections were made as the same relates to both expert witnesses which motions were overruled by the Court.

As the dissenting opinion filed by Judge Clinton reflects, Dr. James P. Grigson, is well known to every practitioner in capital cases. It is this very same "expert witness" that has testified in several punishment phases of criminal proceedings in capital cases which has been noted in Smith v. Estelle, 451 U.S. 454, 101 S.Ct. 866, 68 L.Ed. 2nd 359 (1981). The majority opinion, in review of the evidence, did conclude that the psychiatrist's opinion was improperly admitted, however, that such was harmless error. In the majority's reasoning justifying such conclusion, it states that a psychologist employed by the County is not subject to the same scrutiny as a psychiatrist hired from outside the municipal boundary of the City of San Antonio. The majority opinion rationalizes that unlike Smith v. Estelle, supra

other evidence was admitted during the punishment phase of Appellant's trial. One "rationalized syllogism" is that the Appellant did not object to Dr. Schroeder's testimony who essentially testified to the Appellant's future dangerousness. Contrary to such language, Counsel on numerous occasions objected to the witnesses' testimony (R-2654) - especially as to the witnesses' violation of the Court's Order of restricted access to the Appellant. When inquired of why she disobeyed such an Order, Dr. Schroeder testified that although she assumed an attorney was appointed to represent the Appellant, she did not attempt to talk to any attorneys regarding her examination. (R-21658-9). Despite her knowledge that the Appellant had counsel she undertook to elicit evidenciary information from the Appellant. This Court has seen fit to render the same harmless error beyond a reasonable doubt.

Despite the above, the United States Supreme Court in Holloway v. Arkansas, 435 L.Ed. 2nd 426, 98 S.Ct. 1173 (1978), stated that reversal is automatic when a Defendant is deprived of assistance of counsel (a critical stage in, at least the prosecution of a capital offense). See McKeldin v Rhodes, 631 Fed. 2nd 458 (6th Cir., 1980). In a further indepth review of the majority opinion, the Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2nd 705 (1967), stated that before considering harmless error, the Court must be satisfied beyond a reasonable doubt, that the error did not contribute to the Defendant's conviction and/or punishment meted. Further, if in the course of the prosecution, continuous and repeated references



repeated references are made to such error, and inferences drawn therefrom, such error cannot constitute harmless error.

In the instant case, it is readily apparent that Dr. Grigson's testimony was quite significant.

Further, as stated in United States v. Green, (D.C. Cir., 1982) where the Government refuses and/or interferes with the effective representation, a per se rule applies that the conviction must not be reversed. See United States v. Decoster, 624 Fed. 2nd @ 201; Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792. "At the other end of the continuum are cases, which are untrammeled and unimpaired by State action. 624 Fed. 2nd @ 215.

The cases cited herein are concerned not with the ineffective assistance of counsel, but rather, in various settings, with a denial of counsel altogether. The Defendant, has his right inherently and/or otherwise, to be heard and represented by counsel.

In Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed. 2nd 593 (1975), and in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2nd 426 (1978), stated, citing other authorities, that complete denial of counsel to a Defendant could never give rise to harmless error. See Chapman vs. California, 386 U.S. 18, 23, N. 8, 87 S.Ct. 824, 827, 17 L.Ed. 2nd 705 (1967).

The Sixth Amendment guarantee to effective assistance of counsel is so fundamental that its depravation will mandate reversal of a conviction even absent a showing that the resulting prejudice affected the outcome of the case. See Glasser v. United

States, 315 U.S. 60, 76, 62, S.Ct. 457, 467, 86 L.Ed. 680 (1941). United States v. King, 664 Fed. 2nd 1171 (7th Cir. 1981). Further, the doctrine of assistance of counsel does not allow the Government to dispense with the fundamentals of adversary procedure - to refuse to allow the Defendant to have the assistance of counsel, for example, merely because the Defendant is clearly guilty. See United States v. Velasquez, 772 Fed.2nd 1348 (7th Circ. 1985).

Considering that the above question is at least to be one of a Federal nature under the mandate of Rushen v. Spain, 664 U.S. 114, 104 S.Ct., 453, 78 L.Ed. 2nd, 267(1983), It is plainly clear that under the holding of Holloway v. Arkansas, supra, reversal is automatic where is a Defendant is deprived of assistance of counsel "either through the prosecution or during a critical stage in, at least, the prosecution of a Capital offense" citing three capital cases of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, L.Ed., 2nd 799 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7th L.Ed., 2nd 114 (1961); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed. 2nd 193 (1963).

The majority opinion in a footnote tries to distinguish Holloway v. Arkansas, supra. What is overlooked, however, is that a Court order presented by the prosecutors representing the State of Texas for these "experts" to examine the Defendant is tanamount to state action, without disclosures to such counsel, is effectively a denial of counsel through State action and interference.

In this case, we are not concerned with ineffective



assistance of counsel, but rather, with the denial of counsel altogether. In Geders v. United States, 425 U.S. 80, 96 S.Ct 1330, 47 L.Ed. 2nd 592 (1976), counsel was prohibited by the trial judge from communicating with his client during overnight recess; the Court there held that the Defendant's rights to be heard by counsel had been abridged, further, as in Holloway, in such a situation where a denial of counsel is present, prejudice "is presumed regardless of whether it was independently shown" 435 U.S. 489, 98 S.Ct. 1181. Further, the right to have counsel provided is so fundamental that its violation of that Constitutional right mandates reversal even if no prejudice is shown and even if the Defendant was clearly guilty. United States v. Decoster, supra, See also United States v. Velasquez, 772 Fed. 2nd 1348 (7th Cir. 1985) See also Walberg v. Israel, 766 Fed. 2nd 1171 (7th Cir. 1985).

Under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2nd 705 (1967), if the Court is satisfied beyond a reasonable doubt that the error did not contribute to the Defendant's conviction (or in this case the Defendant's death penalty) that such error would be harmless. However, as in Chapman, continuous and repeated references were made to Chapman's failure to testify in that the inferences drawn therefrom did not constitute harmless error. In the instant case, it is without question that the prosecution argued to the jury reminding them that Dr. Grigson is "Dallas Psychiatrist and Medical Doctor as compared to a mere psychologist employed by Bexar County and then recounted that Dr. Grigson" tells you that on a range from 1 to 10

[Appellant is] a 10 plus" followed with an iteration of terms Dr. Grigson can "explicate so expertly to jurors". As stated in the dissenting opinion, "one may reasonably believe the State's case during the punishment hearing" could have been "significantly less persuasive" had the evidence been excluded". It is without question that such argument falls within the very concise reasoning that was the concern the Chapman Court had before it when rendering this decision 19 years ago. It is without question that there was a very probable impact to the jury of the erroneously admitted evidence in the minds of such fact finders during the punishment phase of Appellant's trial.

II.

THE STATE OF TEXAS HAS APPLIED ITS CAPITAL STATUTE IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY PATTERN REFLECTING A SYSTEMATIC BIAS OF DEATH-SENTENCING OUTCOMES AGAINST BLACK AND MINORITY DEFENDANTS AND THOSE DEFENDANTS WHOSE VICTIMS ARE WHITE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court granted certiorari in McClesky v. Kemp, _____ U.S. _____, 39 Crim L.Rptr 4108. The issue in that case is identical to the one in the present case.

A. DISCRIMINATORY APPLICATION OF THE DEATH PENALTY

The issue is whether the death penalty is applied in a racially discriminatory manner. Petitioner, a negro, was convicted and sentenced to death in San Antonio, Bexar County, Texas for the murder of a white female. Petitioner is unlawfully detained under the Fifth, Sixth, Eighth, and Fourteenth Amendments



to the United States Constitution since Texas' Capital Punishment Statute is discriminatorily applied against blacks and minorities and persons accused of killing white people. This Court should grant certiorari to review this case with McClesky, supra.

B. FACTS SUPPORTING CLAIM

New statistical evidence has emerged to support petitioner's claim that Texas' Capital Sentencing Procedures are discriminatorily applied. Petitioner is entitled to present this evidence of the discriminatory application of the death penalty in Texas. Two recent independent studies show that the administration of the death penalty in Texas is marred by persistent racial disparities in capital sentencing. Louisiana capital defendants who kill white victims are far more likely to receive the death penalty than capital defendants who kill black victims.

A 1984 study (Edland)(Olson) which examined 2,330 Texas murder cases eligible to receive capital punishment found that those sentenced to death from 1972 through 1982 who killed white victims were 8.6 times more likely to receive the death penalty as capital defendants who killed black victims, and 5.4 percent more likely to receive the death penalty as capital defendants who killed hispanic victims.

A survey conducted by a Dallas Times Herald (Henderson and Taylor) published November 17, 1985 examined the race of the defendant and the victim in capital murders from January, 1977 through December 1984 in Texas and other states that imposed death sentences. They found that for Texas those convicted of killing

whites had a 10.7 percent chance of being sentenced to death while those convicted of killing blacks only had a 2.3 percent chance.

C. RACE AND THE DEATH PENALTY

The racial discrimination so widely observed in the criminal justice system of past years has worked particular evil in the area of capital punishment. Statistics compiled nationally from 1930 through 1967 reveal that black persons, although never more that 12 percent of the population, constituted over 53 percent of all those executed during this period. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 46, capital Punishment 1930-1970, 8 (Aug. 1971). For the crime of rape, blacks constituted a remarkable 405 of the 455 total executions that took place. Id. Social scientists who have examined these phenomena more closely report that the disparities are not attributable solely to a higher incidence of crime among blacks. Rather, "[s]trong statistically significant differences in the proportions of blacks sentenced to death, compared to whites, when a variety of non-racial aggravating circumstances are condidered, permit the conclusion that the sentencing differentials are the product of racial discrimination." Wolfgang & Reidel, Race, Judicial Discretion and the Death Penalty, 407 Annals 119 (May 1973).

Petitioner submittes that, if statistics were gathered for those persons now on death row in Texas, they would show that there is a disproportionately high representation by black defendants convicted of killing white victims. And, as with the nationwide statistics, a permissible conclusion is that these



sentencing differentials are the product of racial discrimination.

When this Court struck down the capital statutes in 1972 in Furman v. Georgia, 408 U.S.238 (1972), it did so because, among other reasons, these statutes did not eradicate the influence of racial prejudice in capital sentencing. See Gregg v. Georgia, 428 U.S. 153, 188 (1976). In upholding the post Furman Texas statute, this Court noted that the new statute, on its face "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed ...." Jurek v. Texas, 428 U.S. 262, 276 (1976).

Although the Court approved the facial validity of the Texas statute in Jurek, this constitutes something less than a blanket approval of any and every sentencing result produced by this statute. Texas still has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 466 U.S. 420, 428 (1980)(emphasis supplied). The ultimate Eighth Amendment test remains whether article 37.071 actually works, that is, whether its procedures truly serve to eliminate the invidious racial distinctions that have haunted the past use of the death penalty.

Petitioner contends that the Texas system does not work in this respect, as can be demonstrated by a statistical survey of persons on death row. Despite the facial validity of the statute, it has not eliminated invidious racial discrimination in the capital sentencing process.

Petitioner here, like McCleskey, is convicted of killing a

white female. Petitioner here, as did McCleskey, relies on the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Since the legal issues are identical, petitioner submits that this Court should grant his petition for writ of certiorari.

WHEREFORE, petitioner prays that the Court will grant him leave to proceed in forma pauperis, grant his petition for writ of certiorari and stay his execution pending consideration of this appeal.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

# OPPOSITION BRIEF

EDITOR'S NOTE

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ORIGINAL



NO. 86-6284

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

JOHN T. SATTERWHITE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. WHETHER SATTERWHITE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR AND IMPARTIAL TRIAL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT ALLOWED A WITNESS, JAMES GRIGSON, M.D., TO TESTIFY TO EVIDENCE OBTAINED IN VIOLATION OF ARTICLE I, SECTION 10, OF THE TEXAS CONSTITUTION AND IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE STATE OF TEXAS HAS APPLIED ITS CAPITAL STATUTE IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY PATTERN REFLECTING A SYSTEMATIC BIAS OF DEATH-SENTENCING OUTCOMES AGAINST BLACK AND MINORITY DEFENDANTS AND THOSE DEFENDANTS WHOSE VICTIMS ARE WHITE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.



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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

JOHN T. SATTERWHITE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is not yet published, is reproduced as Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing on December 3, 1986.

[1] For clarity, the Respondent is referred to as "the State," and Petitioner as "Satterwhite."

## JURISDICTION

Satterwhite seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Satterwhite bases his claims upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

The record reflects that Satterwhite was indicted on April 4, 1979, in Bexar County, Texas, for the murder of Mary Francis Davis, while in the course of committing and attempting to commit the offense of robbery. Trial began on September 17, 1979, and on September 19, 1979, the jury found Satterwhite guilty of the offense of capital murder. On September 20, 1979, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon 1981). Accordingly, punishment was assessed at death. Satterwhite appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed on September 17, 1986. Satterwhite v. State, ___ S.W.2d ___, No. 67220 (Tex.Crim.App. Sept. 17, 1986), reh. den., Dec. 3, 1986.

## STATEMENT OF THE FACTS

Satterwhite was arrested in March 13, 1979, less than two days after the commission of the capital murder,[2] and charged with the offense on March 15, 1979 (Tr. 3).[3] On March 16, 1979, the state filed a motion for psychological examination requesting evaluation for purposes of determining competency to stand trial, sanity at the time of the offense, and "also with regard to the defendant's propensity for violence and dangerousness in the future as well as the likelihood of the defendant committing

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[2]The facts surrounding Satterwhite's arrest are set forth in the opinion of the court below. Satterwhite v. State, No. 67,220, at 5-7.

[3]"Tr." refers to the transcript of Satterwhite's 1979 state court proceedings. "SF" refers to the statement of facts.



future acts of violence." (Tr. 1). Dr. Betty Schroeder was appointed that day (Tr. 2).

Dr. Schroeder examined Satterwhite on March 16, 1979. Prior to any conversation, she administered Miranda[4] warnings off the standard police issued card. She discussed with Satterwhite whether an attorney had been appointed (SF VIII 2659). At no time prior to or during the interview did Satterwhite request counsel (SF VIII 2642), and he signed a release form prior to examination.

Q. Dr. Schroeder, my name is Richard Woods one of the attorneys appointed and I have never met you but I have heard about you. You had a conversation and conference with John Satterwhite?

A. Yes. I did.

Q. Okay. Prior to having this conversation with him did you give him any warnings or tell him what you were doing was going to be used in Court against him?

A. Yes. I did.

Q. How did you tell him this?

A. Discussing it with him and I keep a little card in my billfold that I refer to the Miranda warnings.

Q. What kind of card do you keep in your billfold, do you have that available?

A. I have it back in the other office. I keep it in my billfold at all times.

Q. You don't carry your billfold with you at all times?

A. All times except I don't have it now.

THE COURT: Is it one of the cards the police department issues?

THE WITNESS: I got it from them. Yes.

THE COURT: The Court will take notice that contains the Miranda Warning.

ON BEHALF OF THE DEFENDANT
BY MR. WOODS:

---

[4]Miranda v. Arizona, 384 U.S. 436 (1966).

Q. And you gave Mr. Satterwhite the Miranda warnings so to speak that he had a right to have a lawyer to be present during this?

A. Yes. We discussed it and even I asked him to sign a release in order that I might appropriately release the information he was to give me.

Q. Did he sign the release?

A. He did.

Q. And did he have a conversation with you?

A. Yes. Rather lengthy one.

Q. How long did that last?

A. I have seen him on a number of occasions. On that particular occasion I would say probably no more than an hour or hour and fifteen minutes.

Q. And he at no time during this interview or conference asked that a lawyer be present or anything of that nature?

A. No. Not at that time.

Q. What date was this that you saw him and you gave him this warning?

A. I believe I received the order and executed it on the same day, March 16, 1979.

(SF VIII 2641-43). (See SF VIII 2646-47).

At the punishment phase of trial, Dr. Schroeder testified that on March 16, 1979, she administered various standardized tests (SF 2648-51). She attempted to further test Satterwhite on a number of other occasions, but Satterwhite refused (SF 2648, 2652-53). In particular on April 8, 1979, Dr. Schroeder sent an associate to evaluate him, but Satterwhite gave "her an answer which was evasive and he did not care to participate at that time." (SF VIII 2652).[5] "In most cases it wasn't in regard to his rights. It was with regard to some physical conditions such as being hungry, being tired, it being too early or too late." (SF VIII 2648). In response to the state's questions regarding Satterwhite's character and without objection from the defense,

[5]The defense objected to the response as hearsay and the objection was sustained.



Dr. Schroeder opined that he was of average intelligence, that he had a facade of cooperativeness but guarded in many respects,[6] that he had an antisocial personality, and that he would constitute a continuing threat to society (SF VIII 2655-57).

Subsequent to the appointment of counsel,[7] the state filed a second motion for psychiatric evaluation on April 17, 1979, again for the purpose of determining Satterwhite's competency, sanity, and "propensity for violence and dangerousness as well as the likelihood of [his] committing future acts of violence." The state requested evaluation by Dr. John T. Holbrook and Dr. Schroeder (Tr. 22), and the motion was granted on April 18, 1979 (Tr. 23).

On May 18, 1979, a psychological report prepared by Dr. James P. Grigson on May 8, 1979, was filed in the trial court pursuant to court order (Tr. 30).[8] Dr. Grigson examined Satterwhite on May 3, 1979, after administering warnings and specifically informing him that the evaluation would include the future dangerousness issue.

A. I first attempted to examine him on March the 19th of this year but the first time I was able to examine him was May 3rd of this year.

Q. And prior to the examination did you given any type of admonitions to him in the way of warnings?

A. Yes, sir. I did. I explained to him on both occasions the purposes of the examination in terms of the three questions, that I was primarily doing the evaluation in order to determine the question of competency, the question of sanity or insanity and the question of whether or not he presented a

[6]"The guardedness that I saw in many respects and the very cunning kind of guardedness. In fact he examined the release with such tenacity that I was really surprised. He even told me a few things because I was questioning why he made a multitude of marks on the back of it. He told me other experiences he had where he felt his rights had been violated." (SF VIII 2654).

[7]Defense attorney Rick Woods was appointed on April 10, 1979 (Tr. 15).

[8]Dr. Grigson testified the evaluation was performed pursuant to a court order, but that order is not identified in the record on appeal (SF VIII 2694, 2708).

continuing threat to society, whether or not there was a question as to propensity of violence, dangerousness.

I also, after explaining what those three questions meant, explained to him that I did state that there was a Federal Judge by the name of Judge Robert Porter in Dallas who had ruled in cases in a case where if an individual was charged with Capital Murder that they had the right or the option to remain silent or to simply refuse the examination and no psychiatric examination would take place. Now, I did given all of that on both occasions.

Q. And in response to your admonitions on both occasions did he at any time agree to confer with you?

A. Yes, sir. He did.

Q. Did you at any time tell him that whatever or the results of your conference or interview with him could be used against him in a court of law?

A. I told him with regard to the question of dangerousness that if he were to be found guilty of Capital Murder that then in the second phase of the trial, in the punishment phase, that if I found him or any psychiatrist who examined him found him to be dangerous that this could be used in testifying with regard to the case. It could result in his getting possibly the Death Penalty.

(SF VIII 2685-86) (See also VIII 2700-02). In addition to finding Satterwhite competent to stand trial and sane at the time of the offense, Dr. Grigson diagnosed him as sociopathic and constituting a continuing threat to society (Tr. 30; SF VIII 2704-08).

On May 29, 1979, the defense filed a motion to restrict access to Satterwhite requesting that no person be allowed to interview or contact him without first obtaining express written consent of his court-appointed attorneys or by court order obtained only after an adversary hearing with notice to counsel (Tr. 40). The order was granted that date (Tr. 41). On August 24, 1979, Satterwhite moved for psychological examination to determine competency to stand trial and insanity at the time of the offense. Neither defense, however, was pursued at trial.



## SUMMARY OF ARGUMENT

There are no special or important reasons justifying the Court's exercise of its certiorari jurisdiction. Satterwhite's challenge to the admission of Dr. Grigson's psychiatric testimony regarding his future dangerousness as violative of the Texas Constitution does not present a federal constitutional challenge. With respect to his claim that his Fifth Amendment privilege against self-incrimination was violated, the court below correctly found that he was given warnings in compliance with Estelle v. Smith, 451 U.S. 454 (1981). As to his Sixth Amendment claim of denial of the opportunity to consult with counsel prior to the psychiatric interrogation, Smith is readily distinguishable from his case. Both of the state's motions for psychiatric examination, the second of which was filed and granted subsequent to appointment of counsel and prior to Dr. Grigson's evaluation, expressly requested examination to determine "the defendant's propensity for violence and dangerousness in the future as well as the likelihood of the defendant committing future acts of violence." Defense counsel was, thus, afforded reasonable opportunity to advise Satterwhite of the extent to which psychiatric evidence could be employed by the state at the punishment phase of his capital murder trial and to assist him in making the decision of whether to submit to any psychiatric examination.

Satterwhite's challenge to the application of the Texas capital-sentencing statute as being discriminatorily applied against black defendants who murder white victims was not presented to the court below. Therefore, this Court lacks jurisdiction to entertain the claim.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are

special and important reasons therefor. Satterwhite has advanced no special or important reason in this case, and none exists.

II.

ESTELLE V. SMITH IS DISTINGUISHABLE FROM THE CASE BEFORE THE COURT.

Satterwhite contends that the admission of Dr. Grigson's testimony as evidence of his future dangerousness violated his Fifth, Sixth and Fourteenth Amendment rights as established in Estelle v. Smith, 451 U.S. 454 (1981).[9] In Smith, this Court held that the State's introduction into evidence of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information obtained by the psychiatrist from his interrogation of a defendant in custody who has neither requested the examination nor introduced psychiatric evidence on that issue, without a prior warning that the defendant has the right to remain silent and that any statement could be used against him at the sentencing proceeding, violated the rule adopted in Miranda and the defendant's Fifth Amendment privilege against self-incrimination. It further held that where adversary proceedings have been initiated, the failure to give notice that the psychiatric evaluations would encompass the future dangerousness issue violated the defendant's Sixth Amendment right to assistance of counsel before submitting to the pretrial psychiatric interview. Smith is distinguishable from this case.

As the court below correctly found, Satterwhite was administered Miranda warnings prior to both Dr. Schroeder's and Dr. Grigson's evaluation. Dr. Schroeder read him the warnings off the standard issued police card. Dr. Grigson not only specifically informed Satterwhite that the results of the evaluation

[9] Satterwhite also contends that the admission of Dr. Grigson's testimony violated his rights under the Texas Constitution. Such a claim is not cognizable in proceedings before this Court.



might be used as evidence of future dangerousness at the punishment phase of his capital murder trial, but of the federal district court's ruling in Smith v. Estelle, 445 F.Supp. 647 (E.D.Tex. 1977). With respect to both interrogations, Satterwhite waived his rights after having been given admonishments complying with Miranda (SF VIII 2642, 2685-86). Thus, the safeguards of the Fifth Amendment privilege were afforded Satterwhite.

As to the Sixth Amendment claim, Smith is also readily distinguishable. In Smith, Dr. Grigson was appointed by oral communication without notice to defense counsel. The report prepared by Dr. Grigson and filed with the trial court did not specifically apprise the defense of Dr. Grigson's diagnosis as to the future dangerousness issue. The defense was not informed that the state intended to rely on Dr. Grigson's testimony as to future dangerousness until he testified at trial. Even though the defense had requested and was granted disclosure of the state's witnesses, Dr. Grigson's name was never revealed. Smith, 451 U.S. at 457-58. In this case, however, the defense was on actual notice as of the time of appointment that the state intended to determine whether there was any psychiatric evidence to support the future dangerousness issue. Both of the state's motions for psychiatric evaluation which were filed with the trial court on March 16, 1979, and April 17, 1979, the first being prior to appointment of counsel and the latter being subsequent, specifically requested examination for purposes of determining future dangerousness. Thus, even though neither motion listed Dr. Grigson by name, the defense was accorded reasonable opportunity from April 17 to May 8, the date of the psychiatric evaluation, to advise Satterwhite of the extent to which psychiatric evidence could be employed as evidence against him at the punishment phase of his capital murder trial and to assist him in making the decision of whether to submit to any

psychiatric examination, whether by Dr. Holbrook, Dr. Schroeder or Dr. Grigson.[10]

Moreover, the record reflects that Satterwhite was specifically informed by Dr. Schroeder that he had a right to consult with counsel prior to interrogation and that the issue of appointment of counsel was specifically discussed. Prior to the-psychiatric evaluation, Satterwhite signed a release, which he examined with "tenacity" (SF VIII 2654). He was not only informed of his rights by Dr. Grigson, but specifically advised of the federal district court's disposition in Smith. Again, he agreed to the psychiatric interview after full admonitions. Although the court below refused to "presume a waiver from a silent record", Satterwhite, at 21, the record reflects substantial evidence that Satterwhite waived his right to consult with counsel prior to psychiatric evaluation. Smith, 451 U.S. at 471 n.16 (noting that an accused may waive his Sixth Amendment right to consult with counsel prior to psychiatric interrogation); cf., Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (recognizing that an accused may waive his Sixth Amendment right to consult with counsel prior to custodial interrogation without notice to counsel). Whether or not application of the harmless-error doctrine was correct, Satterwhite's claimed Smith violation is without merit. The exercise of this Court's certiorari jurisdiction is not warranted.

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[10] Smith did not find any constitutional right to have counsel actually present during the examination. 451 U.S. at 470 n.14.



III.

SATTERWHITE'S CHALLENGE TO THE TEXAS CAPITAL-SENTENCING STATUTE AS BEING DISCRIMINATORILY APPLIED AGAINST BLACK DEFENDANTS WHO KILL WHITE VICTIMS WAS NOT PROPERLY PRESENTED TO THE COURT BELOW.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. E.g., Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1985); Illinois v. Gates, 462 U.S. 213, 218-222 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919). Because Satterwhite has not presented his claim to the court below, the Court's jurisdiction has not been properly invoked.

CONCLUSION

For these reasons, the State respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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JOHN T. SATTERWHITE, Appellant

NO. 67,220 v. --- Appeal from BEXAR COUNTY

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of capital murder. The punishment is death.

The appellant contends that the trial court erred in overruling his motion for new trial. He asserts that the State selectively discriminated against him in violation of the due process and equal protection clauses of the Fourteenth Amendment by prosecuting him for capital murder. The appellant contends that he was sexually discriminated against since females in similar situations received more lenient treatment.

At a hearing on the appellant's motion for new trial, three attorneys, who had practiced criminal law in the county, testified. One of them stated that he felt it was the prosecution's practice to seek greater penalties for men than women. Another stated that it was his experience that females got better deals than males. Finally, appellant's counsel testified that in every case he had seen where the co-defendants are male and female, the female always got the better deal. The State presented no evidence.

In order to establish a constitutional violation by the selective prosecution of a defendant, it is necessary to show more than mere unequal application of a state statute. As the Supreme Court stated in Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962):

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case imply a policy of selective enforcement, it was not stated that the selection was deliberately had upon an unjustifiable standard such as race, religion, or other arbitrary classifications. (Emphasis added)

Therefore, it is necessary that the accused show an intentional or purposeful discrimination in the enforcement of the statute against him. A discriminating purpose will not be presumed; a showing of clear intentional discrimination is required. Armendariz v. State, 529 S.W.2d 525 (Tex.Cr.App. 1975); S.S. Kresge Co. v. State, 546 S.W.2d 929 (Tex.Civ.App., Dallas, 1977); Super X Drugs of Texas, Inc. v. State, 505 S.W.2d 333 (Tex.Civ.App., Houston, 1974); Enntex Oil and Gas Co. (of Nevada) v. State, 560 S.W.2d 494 (Tex.Civ.App., Texarkana, 1977). The appellant has failed to show actual or purposeful discrimination. His ground of error is overruled. Also see U.S. v. Hayes, 589 F.2d 811 (5th Cir. 1979); U.S. v. Heilman, 614 F.2d 1133 (7th Cir. 1980); U.S. v. Diggs, 613 F.2d 988 (D.C.Cir. 1979); U.S. v. Larson, 612 F.2d 1301 (8th Cir. 1980); U.S. v. Choate, 619 F.2d 21 (9th Cir. 1980).

In two grounds of error the appellant argues that the trial court erred by refusing his challenge for cause to a prospective juror. The appellant contends that this prospective juror admitted having a bias or prejudice against a law upon which the defense was entitled to rely. See Art. 35.16(c)(2) V.A.C.C.P. Appellant argues that the juror had a bias against allowing a defendant not to testify or defend himself. During voir dire of venireman Mavis Corderman, the following occurred:

ON BEHALF OF THE DEFENSE

BY MR. TAKAS:

Q. Now, you have heard people talk about presumption of innocence. The presumption of innocence that every person is presumed





innocent until proven guilty, do you understand that concept or do you believe you understand that concept.

A. Yes, sir.

Q. So to say what it means is that I don't have to say anything to disprove his guilt. I do not have to take any affirmative action to say I'm not guilty. I do not have to answer accusers because I'm innocent and the law presumes I'm innocent and the Constitution of the State of Texas and United States of America says I am innocent and until they lift that cloak of innocence by fair and competent evidence. Do you have any quarrel with that concept?

A. You are telling me that in other words you don't have to defend yourself.

Q. If you have a quarrel with that say it. My mother has a quarrel with it.

A. Well, I guess I do. I don't know if I would call it quarrel, but --

Q. Do you have a bias against the law that says that the Defendant does not have to defend himself?

A. There again, I guess maybe I do. I haven't thought about that.

Q. Okay.

MR. TAKAS: We challenge for cause, Judge. Bias or prejudice exists on the basic theory of law.

THE COURT: Do you wish to inquire?

MR. HARRIS: Yes, sir.

* * *

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. There are a number of ways a defendant can defend himself. One of those ways can be merely asking questions of the witnesses against him, that being cross examination. I think the real question is the 5th Amendment to the United States Constitution says a person shall not be required to testify against himself or offer evidance against himself.

What that means is you will be instructed in a case where a defendant does not testify, you are instructed that you cannot and must not, first of all, it says you are instructed that the Defendant in this case has elected not to testify. You are instructed that you must not and you cannot consider that as any evidence against him. The mere fact that he did not testify. Do you think you could follow an instruction like that?

A. Yes.

THE COURT: What was your answer?

THE WITNESS: Yes. I don't quite understand what he is saying.

THE COURT: Let me see if I can help you a little, Mrs. Corderman.

BY THE COURT:

Q. The Defendant doesn't have to prove his innocence. We have talked about presumption of innocence.

A. Right.

Q. The State has the burden of proving his guilt which means they have to put on the evidence. He doesn't have to put on anything. If he and his attorneys think it's better for him to just sit there and see what they do, the law permits him to do that and you must reach your verdict based on the vidence that is offered, not the evidence that is not offered.

A. I think I can make a decision.

MR. TAKAS: Judge, I don't think that is a correct statement.

THE COURT: I will overrule the challenge for cause. You may question.

MR. TAKAS: Note my exception for challenge for cause and you are overruling it.

Article 35.16(c)(2), supra, provides:

A challenge for cause may be made by the defense for any of the following reasons:

* * *

(2) That he has a bias or prejudice against any of the law applicable to the case





upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof on the punishment thereof.

In order to determine if a venireman was subject to a challenge for cause, we must examine the testimony given by the venireman on voir dire in its entirety. Evert v. State, 561 S.W.2d 439 (Tex.Cr.App. 1978). In reviewing the testimony given above, we conclude that the appellant has failed to establish that the prospective juror was subject to challenge for cause pursuant to Art. 35.169c)(2), supra. The testimony of the juror elicited from both the prosecution and the trial court indicate that the juror was capable of following an instruction that she would not consider the appellant's failure to testify or present evidence as any evidence against him. The record does not support the appellant's contention. See Von Byrd v. State, 569 S.W.2d 883 (Tex.Cr.App. 1978), cert. denied 441 U.S. 888; Simmons v. State, 594 S.W.2d 760 (Tex.Cr.App. 1980); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980). Compare Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980); Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978); Evert v. State, supra. His grounds of error are overruled.

The appellant in his next ground of error contends that the trial court erred in overruling his motion to suppress evidence seized by Officer Jackley. The appellant argues that a pistol, subsequently shown to be the murder weapon, was unlawfully seized.

Officer Jackley testified that he was a police officer with the Live Oak Police Department. On March 13, 1979, he was clocking the speed of automobiles with radar on a highway. At approximately 10:17 p.m., he noticed a vehicle traveling at eighty-two miles per hour. The officer immediately pulled

behind the vehicle and turned on his overhead lights and emergency lights. The automobile did not stop but did slow down to about sixty-five miles per hour. The car was traveling in the left lane of a divided four-lane highway and no attempt was made by the driver to move over to the right lane. Officer Jackley flashed his high beams to attract the attention of the driver. He noticed that the passenger kept turning around to look back at him and that the driver kept adjusting the rear-view mirror. He stated that there was generally a lot of movement in the car. He then turned his spotlight on the car to see the movement and get their attention. Jackley testified that the passenger looked as if she were bending over in the seat and the driver continued to fidget with the mirror.

The officer pursued the vehicle for about one mile when suddenly the vehicle quickly exited the highway to the left onto the grassy median and came to a stop. The area was dark and Officer Jackley was alone. He radioed the dispatcher his location and stepped from his vehicle. The appellant stepped out from the driver's side and approached the back of his automobile. Officer Jackley then asked the female passenger, Sharon Bell, to also get out of the automobile. She complied with his order and the officer turned them around and began to pat them down for weapons. He stated that the pair acted in a very nervous fashion. Bell asked Jackley what he was doing and he told her that he was checking for weapons. Bell immediately became quiet and then started walking toward their automobile. She walked toward the driver's side where the door was still open. Officer Jackley ordered her to stop but she continued to walk on toward the open door. Again, he ordered her to stop as she reached the door and she stopped. She started to say





something and the officer ordered her to return to the back of the vehicle.

Officer Jackley sat down in the driver's seat of the appellant's automobile and felt around the seat. As he was doing this, the pair walked around to see what he was doing and he ordered them to get back. The officer then opened the glove box and found a pistol. The officer stated that he believed the pair was armed and that he was in fear of his life. The pistol was admitted in evidence at trial.

The appellant argues that the weapon was seized pursuant to an unlawful search. We do not agree.

In the present case, there can be no question that Officer Jackley's initial stop of the automobile appellant was driving was valid and proper. The officer saw that the traffic violation of speeding had occurred. Art. 6701d, §166, Vernon's Ann.Civ.St.; Borner v. State, 521 S.W.2d 552 (Tex.Cr.App. 1975). Additionally, the officer saw the appellant fail to stop his vehicle after being given a signal to stop, Art. 6701d, §186, supra, and appellant improperly stop the vehicle. Art. 6701d, §79, supra. Therefore, the officer was authorized to stop the vehicle and arrest any person found committing the traffic offenses. Art. 6701d, §157, supra; Art. 14.01(b) V.A.C.C.P. Furthermore, since Officer Jackley had seen the commission of a traffic offense other than the offense of speeding, he, in addition to arresting the appellant, was authorized to take the appellant into custody. Christian v. State, 592 S.W.2d 625 (Tex.Cr.App. 1980) (opinion on rehearing, cert. denied 446 U.S. 784, 100 S.Ct. 2966, 64 L.Ed.2d 841 (199_); Tores v. State, 518 S.W.2d 378 (Tex.Cr.App. 1975).

The Supreme Court, in New York v. Belton, 29 Cr.L. 3124 (1981), recently stated the following:

> [N]o straightforward rule has emerged from the litigated cases respecting the question involved here - the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.
>
> * * * * *
>
> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, the court here found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests that generalization that articles inside the relatively narrow compass of the passsenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' Chimel, supra, at 763. In order to establish the workable rule this category of cases requires as we read Chimel's definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

We conclude that Officer Jackley's search of the vehicle was a search incident to arrest and was therefore lawful. Furthermore, we believe that even if the appellant's arrest at the time of the search was not custodial, it would, nonetheless, be lawful.





We have acknowledged that an officer should be permitted to take every reasonable precaution to safeguard his life in the process of making an arrest, even though the arrest is initially non-custodial. See Lewis v. State, 502 S.W.2d 699 (Tex.Cr.App. 1973). If, under the totality of the circumstances presented to the officer, he has reasonable grounds to believe that he is in danger of bodily harm or that the person he encounters is armed and dangerous, only then will justification for such a search exist. Lewis v. State, supra.

In the case at bar, the evidence reflects that the officer had reasonable grounds to believe that he was in danger of bodily injury and the limited search was conducted solely for his own protection. In light of the evidence of the case, the hour of the night, the movement inside the car, and the actions of occupants after the stop, we conclude that the officer was justified in believing he was in danger. The area searched by the officer was one in which the occupants could have easily reached and obtained a weapon. Imhoff v. State, 494 S.W.2d. 919 (Tex.Cr.App. 1973); Lewis v. State, supra, Borner v. State, supra. Compare Wilson v. State, 511 S.W.2d 531 (Tex.Cr.App. 1974); Keah v. State, 508 S.W.2d 836 (Tex.Cr.App. 1974). The search was lawful; appellant's ground of error is overruled.

The appellant in his next ground of error asserts that the evidence is insufficient to corroborate the testimony of the accomplice witness, Sharon Bell. The jury was instructed that if an offense occurred, Bell was an accomplice as a matter of law.

Article 38.14, V.A.C.C.P., provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

In applying the statute to cases where the sufficiency of the evidence to corroborate the accomplice is challenged we eliminate from consideration the evidence of the accomplice witness and examine the other evidence to ascertain whether there is inculpatory evidence tending to connect the defendant with the commission of the offense. Moron v. State, 702 S.W.2d 624 (Tex.Cr.App. 1985); Cruz v. State, 690 S.W.2d 246 (Tex.Cr.App. 1985); Brown v. State, 672 S.W.2d 487 (Tex.Cr.App. 1984). Rice v. State, 587 S.W.2d 689 (Tex.Cr.App. 1979) (opinion on rehearing); Carrillo v. State, 591 S.W.2d 876 (Tex.Cr.App. 1979); Shannon v. State, 567 S.W.2d 510 (Tex.Cr.App. 1976); Edwards v. State, 427 S.W.2d 629 (Tex.Cr.App. 1968).

In the present case, Sharon Bell, the accomplice, testified that on the morning of March 12, 1979, she and the appellant drove to the Lone Star Ice and Food Store. The pair entered the store and Bell got a Coke. She asked the deceased about some teething medicine and Robitussin for babies. While they were inside, Bell noticed another customer. The customer told the deceased that if she needed anything he would be painting around the corner. The man left. Bell also noticed that another customer, a young Mexican-American male, came in and left.

After he left, the appellant and Bell approached the cash register where the deceased was standing. Bell asked for two or three packages of Kool cigarettes. The deceased placed them on the counter, whereupon the appellant pulled a pistol out, pointed it at the deceased, and demanded that the deceased give him money. The deceased opened the cash register and placed the money in a paper sack. The deceased then volunteered that





there was more money in the vault. The three went to the vault where the deceased opened the vault and placed the contents in the sack and handed it to Bell. Bell then headed for the door. When she left the vault area, the appellant was pointing the gun towards the deceased's temple. As she was leaving the store she heard the deceased ask the appellant not to shoot her. She then heard two or three gunshots. The pair got in the car and left. When she asked the appellant why he shot her, he stated he did not want to leave any witnesses.

Later that day, the appellant, with his brother and Bell, went to a car rental. The vehicle used in the offense was rented and they returned it and exchanged it for a Cougar. The appellant gave his brother cash from the robbery to rent the vehicle.

On the following day Bell, the appellant, and a companion went to Seguin. They returned to San Antonio to drop off the companion and then attempted to return to Seguin. Bell stated that on the return trip, they were stopped by a police officer and the pistol used in the robbery was found. Bell later told the police the pistol was hers and was subsequently convicted of unlawfully carrying a weapon. She testified that she told the police that the gun was hers so that both of them would not have to go to jail. At trial, Bell denied that the gun belonged to her.

Bell admitted that she had been convicted of the offense of murder with malice in 1974. She also stated that she was convicted for theft and was fined.

The non-accomplice evidence reveals that on the day of the offense, Aaron Archterberg went to the store before 9:00 a.m. He testified that he bought a seventy-nine cent sponge. It was

later shown that the next to last purchase appearing on the cash register tape was for seventy-nine cents. He was painting about a block and a half away from the store. He stated he saw a couple in the store and he identified the appellant as the male. He also stated that he had identified the female and was informed that her name was Sharon Bell. He also stated he remembered that Bell was purchasing or was about to purchase cigarettes which were in a green and white package.

Kenneth Rodriguez testified that he visited the store around 8:35 to 8:40 a.m. He saw the deceased and a couple inside the store. He identified the male as the appellant. He heard the female ask for Robitussin. The couple were still there after he left.

Josie Jeffries testified that she visited the store around 8:30 a.m. When she went in, she noticed that the cash register was open and empty. She also noticed keys and change on the floor. There was a package of Kool cigarettes on the counter. She and other persons who had entered the store then began to search the store; they found the deceased, shot, in the bathroom.

Juan Ramirez stated that he entered the store around 9:00 a.m. He stated that the deceased was not there and that after other people arrived, they looked for her. They subsequently found her and the police were called.

Various police officers stated that after they received a radio call they went to the Lone Star Ice and Food Store. The earliest any of them heard the radio call was 9:10 a.m. They found the deceased with close range bullet wounds in each of her temples. They also found the safe open.





Aric Moworth testified that on March 7 he rented an automobile to Joe Satterwhite. On the afternoon of March 12 Joe Satterwhite returned with his brother, the appellant, and exchanged the first car for a blue Cougar. He stated that the appellant picked out the automobile. He also stated that he was paid in cash.

Officer March Jackley testified that on March 13 he stopped a blue Cougar driven by the appellant. He found a pistol in the glove compartment of the vehicle.

Eva Castillo testified that on February 23, 1979, she sold a pistol to Lillie Merriweather. The pistol was the same type and contained the same serial number as the one found by Officer Jackley. Subsequent testimony revealed that the appellant's mother's name was Lillie Merriweather.

Two bullets were recovered from the deceased's body. A ballistics expert testified that the bullets were fired from the pistol seized by Officer Jackley.

The non-accomplice testimony is sufficient to corroborate Bell's testimony. The non-accomplice testimony places the appellant at the scene of the crime with the deceased the time she was last seen alive. See Ayala v. State, 511 S.W.2d (Tex.Cr.App. 1974), cert. denied 420 U.S. 910; Edwards v. State, supra. The appellant and the accomplice were found to be in possession of the murder weapon and their attempted journey from San Antonio to Seguin may be considered as flight. See Edwards v. State, supra. The evidence presented is more than a mere showing that an offense occurred. It is not necessary that the non-accomplice evidence directly link the appellant to the crime or be sufficient for guilt. Rather, all that is required is

that the non-accomplice evidence tend to connect appellant with the offense committed. The non-accomplice testimony was sufficient to corroborate Sharon Bell's testimony; the appellant's ground of error is overruled.

The appellant in his next two grounds of error asserts that the trial court erred when it denied appellant's requested jury instructions. The requested instructions would have instructed the jury that if they found that Sharon Bell shot the deceased in furtherance of a conspiracy with the appellant to commit aggravated robbery, they should find the appellant guilty of the offense of capital murder. However, if they found that the murder of the deceased by Sharon Bell was an act of her own volition and not in the furtherance of the conspiracy, they should find him not guilty of capital murder.[1/] The requested charges

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1/ The requested instructions were as follows:

Now, therefore, if you find from the evidence beyond a reasonable doubt that on the 12th day of March, 1979, in Bexar County, Texas, as alleged in the indictment that Sharon Rene Bell and the defendant, John T. Satterwhite had entered into and were attempting to carry out a conspiracy to commit the crime of aggravated robbery as those terms have been defined for you and that Sharon Rene Bell was then and there attempting to carry out said conspiracy between herself and the defendant, John T. Satterwhite, and you further find that Sharon Rene Bell did then and there with a gun intentionally shoot and kill and thereby cause the death of Mary Frances Davis, and you further find that said offense of murder was so committed by Sharon Rene Bell in furtherance of the unlawful purpose of Sharon Rene Bell and the defendant, John T. Satterwhite, and was one that should have been anticipated as a result of carrying out of their conspiracy to commit the offense of aggravated robbery, then you will find the defendant guilty of the offense of capital murder. If you do not so find or if you have a reasonable doubt thereof, you will acquit him.

You are further instructed that if you find the foregoing facts beyond a reasonable doubt from the evidence that the offense of murder was actually committed by the separate act of Sharon Rene Bell acting of her own separate volition, or you believe or have a reasonable doubt that such offense of murder on the part of Sharon Rene Bell was

(Continued)





were in fact instructing the jury on the issue of whether the killing was on an independent impulse by Bell, and not in furtherance of a conspiracy to commit aggravated robbery. V.T.C.A. Penal Code, §7.01(b) provides that:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

However, before such a charge is given, there must be evidence before the jury raising the issue.

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(Footnote 1 continued)
not in furtherance of the original unlawful purpose of Sharon Rene Bell and the defendant, John T. Satterwhite, or was not such an offense as should have been anticipated as a result of the carrying out of the commission of the crime of aggravated robbery, then you will acquit the defendant, John T. Satterwhite, and say by your verdict not guilty of the crime of capital murder and then determine whether or not [sic] the defendant, is guilty of some other offense as herein defined to you.

You are further instructed that if you find the foregoing facts (referring to the direct charge on parties to an offense who in the commission of one conspiracy commit another conspiracy) beyond a reasonable doubt except that you find from the evidence, or you have a reasonable doubt thereof, that in killing MARY FRANCES DAVIS said SHARON RENE BELL was acting outside of the common plan and design of SHARON RENE BELL and JOHN T. SATTERWHITE or that said killing was not in the furtherance of the common purpose and design of both SHARON RENE BELL and JOHN T. SATTERWHITE and that JOHN T. SATTERWHITE had no knowledge of the intent of SHARON RENE BELL or that said killing was not one that should have been anticipated by the said JOHN T. SATTERWHITE then you will find the defendant not guilty of capital murder, and then proceed to determine if the Defendant is guilty of some lesser included offense.

(End of footnote)

In the present case there is no evidence that Bell did the actual killing. Additionally, there is no evidence that a conspiracy existed between the appellant and Bell. A charge on a defensive theory is only required when the evidence raises that issue. Lopez v. State, 574 S.W.2d 563 (Tex.Cr.App. 1978). Furthermore, the evidence presented at trial of the appellant's conduct alone was sufficient to sustain the conviction; no charge on independent impulse was necessary. Bowers v. State, 570 S.W.2d 929 (Tex.Cr.App. 1978); McGuin v. State, 505 S.W.2d 827 (Tex.Cr.App. 1974). The trial court did not err in refusing appellant's requested jury instruction; the grounds of error are overruled.

The appellant also contends that the trial court erred in instructing the jury on the law of parties. The trial court, over appellant's objection, gave an abstract instruction on the law of parties defining criminal responsibility according to V.T.C.A. Penal Code, §7.02(a)(2).[2/] The trial court then applied the law to the facts in the instruction. The appellant claims that there was no evidence presented which raised that issue and that the trial court improperly included the instruction resulting in harm to the appellant.

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2/ Sec. 7.02(a)(2) provides as follows:

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> * * *
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense,...





However a review of the record reveals that the appellant in his Requested Instruction No. 10 requested that the following instruction be given:

> Before you are warranted in convicting the defendant of capital murder, you must find beyond a reasonable doubt that on March 12, 1979, that the defendant, John T. Satterwhite, either alone, or as a party to the offense, or in the furtherance of a conspiracy to commit a felony offense, as those terms have been above defined to you, was engaged in the commission of the felony offense of robbery, and also during the commission of the robbery, the defendant, John T. Satterwhite, either alone, as a party to the offense, or in the furtherance of a conspiracy to commit a felony offense, intentionally shot the deceased, with the intention of thereby killing her.
>
> Therefore, unless you find from the evidence beyond a reasonable doubt that the defendant, on the occasion in question, either alone, or as a party to the offense of robbery, or in the furtherance of a conspiracy to commit the offense of robbery, specifically intended to kill the said deceased, Mary Frances Davis, when he shot her, if he did, you cannot convict him of the offense of capital murder. If you have a reasonable doubt, you must find the defendant not guilty of the crime of capital murder.
>
> You are, therefore, instructed that if you find and believe from the evidence beyond a reasonable doubt that the defendant, John T. Satterwhite, in the County of Bexar, State of Texas, on or about the 12th day of March, 1979, committed or attempted to commit the offense of robbery and that in the course of and in furtherance of or in immediate flight from the commission or attempt to commit the offense of robbery, if any, the defendant, John T. Satterwhite, did or attempted to participate in the offense of robbery knowing that one of the participants to the robbery was in possession of a gun, and that this act was clearly dangerous to human life, if it was, and did thereby cause the death of Mary Frances Davis, if it did, then you will find the defendant guilty of murder, but if you do not so find, or if you have a reasonable doubt thereof, you will find the defendant not guilty of murder and next proceed to determine if he is guilty of any lesser offense.

The instruction requested by the appellant was essentially the same as the instruction subsequently given by the trial court. We also note that appellant's Requested Instruction No. 1 and No. 11, discussed previously, also dealt with the law concerning criminal responsibility. Two additional instructions requested by the appellant involved the law of parties.[3/] We therefore conclude that error, if any, in instructing the jury on the law of parties was waived by appellant's requested instructions. Appellant cannot be heard to complain about instructions given by the trial court where it is essentially the same charge as was requested by appellant. This ground of error is without merit.

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[3/] The appellant's Requested Instruction No. 2 requested the following instruction be given:

> You are further instructed that if you find from the evidence, or have a reasonable doubt, based from the evidence that the offense of murder was actually committed by the separate act of the defendant, John T. Satterwhite acting of his own separate volition, and you believe, or have a reasonable doubt, that such offense of murder on the part of the other defendant, Sharon Rene Bell, was not in furtherance of the original unlawful purpose of both the Defendants and was not such an offense as should have been anticipated as a result of the carrying out of the offense of robbery, if any, then you will find the defendant, John T. Satterwhite, not guilty of the offense of capital murder and then next proceed to determine from the evidence whether or not the defendant, John T. Satterwhite, is guilty of any lesser included offense.

His Requested Instruction No. 7 requested the following instruction be given:

> Mere presence at the scene of a crime does not constitute conduct sufficient, standing by itself, to make a person criminally responsible as a part to an offense for the conduct of another.





Additionally, we note that as the evidence of appellant's conduct alone was sufficient to sustain the conviction, no charge on parties was required. Todd v. State, 601 S.W.2d 718 (Tex.Cr.App. 1980). The charge made appellant's guilt contingent on a finding that he committed the offense either acting alone or as a party. Because the jury was authorized to convict appellant if it found he was acting alone, any error was harmless. Todd v. State, supra. The ground of error is overruled.

Appellant in his next ground of error argues that the trial court erred in admitting into evidence the testimony of a psychiatrist, Dr. Grigson, during the punishment phase of the trial. Appellant maintains that the testimony was obtained in violation of his rights as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Appellant relies upon the recent decision of the United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in which Dr. Grigson once again testified during the punishment phase of a capital murder trial. Dr. Grigson was the only witness the State presented during the punishment phase, in which he stated that the appellant was a sociopath and a continuing threat to society. See Art. 37.071, V.A.C.C.P. Dr. Grigson's testimony was based upon an examination of Smith while he was in custody. The Supreme Court held that Dr. Grigson's testimony was inadmissible because prior to the doctor's examination, the appellant was not informed that any statement he made could be used against him and that he had the right to remain silent. Thus, the statements made to the psychiatrist were not freely and voluntarily given and were therefore obtained in violation of his privilege against

self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court also held that Smith's Sixth Amendment right to assistance of counsel had been violated. The examination in question took place after the appellant had been indicted, meaning that his right to assistance of counsel had attached. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The Court stated that defense counsel was not given advance notice that the examination would encompass the issue of their client's future dangerousness, and that Smith "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's finding could be employed." Smith did not waive counsel, therefore the admission of Dr. Grigson's testimony violated his Sixth Amendment right to assistance of counsel.

In the present case appellant similarly argues that both his Fifth Amendment and Sixth Amendment rights were violated by the admission of Dr. Grigson's testimony. Before we address the Fifth Amendment issue we conclude that appellant's Sixth Amendment right to assistance of counsel was violated.

The offense in question occurred on March 12, 1979, and appellant was arrested on March 13. On March 15 or 16 appellant was charged with capital murder.[4/] Dr. Grigson testified that

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4/ Appellant was indicted on April 4 and counsel was appointed on April 10.





on March 19, pursuant to a court order, he attempted to examine appellant. He was unable to conduct the examination at that time but did examine the accused on May 3. The record does not contain a court order instructing Dr. Grigson to examine appellant. As in Estelle v. Smith, appellant had already been indicted when this examination took place. Thus, his right to assistance of counsel had attached. Kirby v. Illinois, supra. While the attachment of that right does not mean that appellant had a constitutional right to have counsel actually present during the examination, Estelle v. Smith, supra, it does mean that appellant's attorneys should have been informed that an examination, which would encompass the issue of future dangerousness, was to take place. Additionally, the attachment of this right meant that appellant could have consulted with his attorney prior to the examination. There is nothing to indicate that appellant gave a knowing, intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record. We, therefore, conclude that Dr. Grigson's testimony was improperly admitted into evidence in violation of appellant's Sixth Amendment right to assistance of counsel.

While we conclude that this admission was error we further hold that in light of other evidence presented, its admission did not constitute reversible error. Unlike in Estelle v. Smith, Dr. Grigson's testimony was not the only evidence offered by the State during the punishment phase of the trial.

Here, eight peace officers testified that appellant's reputation for being a peaceful and law abiding citizen was bad. One of the officers stated that he had a confrontation with appellant. He said that after receiving a complaint about

appellant, he attempted to question him. As he approached appellant, appellant reached inside his waistband. The officer grabbed his hand and found a loaded pistol inside appellant's waistband.

Lee Roy Merriweather testified that he used to be married to appellant's mother. He stated that less than a year before the present offense, he had an argument with appellant. Merriweather locked appellant out of their home and he responded by shooting at Merriweather through the door. The witness was hit twice and was hospitalized for a month.

The evidence presented also showed that appellant had been convicted of aggravated assault, burglary with intent to commit theft, theft under fifty dollars, and robbery by assault with firearms.

Additionally, Dr. Betty Lou Schroeder, a psychologist, testified as to appellant's future dangerousness. Appellant did not object to Dr. Schroeder's testimony at trial and does not complain of its admission on appeal. We note that prior to examining appellant, Dr. Schroeder informed him of his rights as outlined in Miranda v. Arizona, supra. Additionally, the doctor obtained a release from appellant so as to allow her to release the information she obtained from the interview.

Dr. Schroeder's testimony was very similar to Dr. Grigson's concerning their conclusions about appellant. Both stated that appellant was a cunning individual, very evasive and very guarded. She added that appellant was a user of people, had an antisocial personality and an inability to feel empathy, and would be a continuing threat to society through his acts of criminal violence.





The jury also had the evidence adduced at the guilt stage of the trial for its consideration in answering the special issues at the punishment phase. Brown v. State, 627 S.W.2d 152 (Tex.Cr.App. 1983); O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr.App. 1979). The evidence at the guilt stage was undisputed that appellant committed a brutal and senseless murder during the course of a robbery. Even though he had obtained the money from the cash register and safe, he shot the deceased two or three times in the head at close range so that there would be no witnesses. The facts of this crime show that appellant's conduct was calculated and remorseless. Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976).

We conclude that the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" even if Dr. Grigson's testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt. Sanne v. State, 609 S.W.2d 762 (Tex.Cr.App. 1980). The appellant's Sixth Amendment ground is overruled. 5/

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5/ The Court recognizes the holding in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), in which the United States Supreme Court stated that, "this Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' Chapman v. California, [386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]". While applicable at first glance, the holding in Holloway is distinguishable from the case at bar.

(Continued)

As to his Fifth Amendment claim, appellant maintains that Dr. Grigson failed to properly inform him of rights under Miranda, supra, prior to the examination. In Smith, the Court held that prior to psychiatric interrogation an accused is entitled to be informed of his rights as outlined in Miranda, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." Miranda, 467-469, 86 S.Ct., at 1624-1625.

Unlike his examination in Estelle v. Smith, in the present case Dr. Grigson testified that prior to any questioning he explained to appellant that the purpose of the interview was to determine appellant's competency to stand trial, his sanity at the time of the offense, and whether he presented a continuing threat to society. Dr. Grigson then admonished appellant that

(Footnote 5 continued)

In Holloway, the Sixth Amendment violation arose through one attorney's joint representation of co-defendants with arguable conflicting interests. The conviction was reversed on the basis that once the existence of a possible conflict is presented to the judge, failure to thereafter appoint separate counsel for each co-defendant violated the Sixth Amendment. It was in this limited context that the Court concluded that a violation of one's constitutional right to counsel can never be harmless error; a context in which the violation was so fundamentally unfair, it irrevocably tainted the entire proceeding.

The error in the present case, while just as improper, related only to the admission of Dr. Grigson's testimony, rather than to the proceeding as a whole.

We feel certain that the evidentiary nature of this error, rendered harmless by the facts of the crime for which he was on trial, his bad reputation, his use of firearms in the past, his four prior convictions and the uncontested testimony of Dr. Schroeder, was a form of Sixth Amendment violation not contemplated by the Court in Holloway. "We decline to follow what one judicial scholar has termed 'the domino method of constitutional adjudication ... wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.'" Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).





he had the "option to remain silent or to simply refuse the examination and no psychiatric examination would take place." The doctor also told him that the results of the examination "could be harmful or it could be helpful depending upon what the findings would be." Subsequent to these warnings appellant consented to the examination; Dr. Grigson thereafter concluded that appellant would "present a continuing threat to society by continuing acts of violence."

We find the warnings given to appellant sufficient under the holdings of Estelle v. Smith and Miranda. No error is presented and appellant's Fifth Amendment claim is overruled.

Appellant in his final ground of error contends that his conviction was obtained in violation of the Speedy Trial Act, Art. 32A.02, V.A.C.C.P. A hearing on appellant's motion to set aside the indictment for failure to comply with the Speedy Trial Act was held on August 27, 1979. The State announced ready and the trial court overruled appellant's motion.

The record reflects that appellant was arrested and charged on either March 15 or March 16, 1979. On April 9 counsel was appointed for appellant and on April 13 he was arraigned. At the arraignment, the State filed a written announcement of ready, a pre-trial hearing was set for May 17, and the trial was set for May 29. On May 29, a hearing was held and several of appellant's pre-trial motions were ruled upon. At the May 29 hearing, one of the district attorneys stated that he was not completely familiar with the files and anticipated that the case would not be tried that week. The trial court stated that he had the same anticipation and it was later revealed that another capital murder case was set for the next week.

At the hearing on August 27 on appellant's motion to set aside the indictment, two members of the district attorney's office testified. Roy Barrera, Jr. stated he subscribed the announcement of ready that was filed on April 13. He testified that he had prepared for the trial prior to April 13 but that the subpoenas had not been sent. However, he had compiled a witness list with their names, addresses and phone numbers so that they could be contacted when needed. He was unsure if all the witnesses had been contacted or whether the psychiatric expert was ready to testify. Barrera, however, testified that he was familiar with the case and the facts and was ready to go to trial if necessary. He added that he was ready to go to trial without the subpoenas being issued and without psychiatric testimony if necessary. He concluded that he had no doubt that the State could have begun jury selection on that date.

Bill Harris, also of the district attorney's office, testified that he had stated he was not familiar with the file in this case in the middle of May.

Appellant contends that this evidence is sufficient to establish that the State was not ready for trial within the time limits required by Art. 32A.02, supra. We do not agree.

An announcement of ready by the State is a prima facie showing of compliance with the Speedy Trial Act. Fraire v. State, 588 S.W.2d 789 (Tex.Cr.App. 1979); Barfield v. State, 586 S.W.2d 538 (Tex.Cr.App. 1979). However, the defendant may rebut such a showing by presenting evidence that demonstrates that the State was not ready for trial during the time limits of the Speedy Trial Act. Barfield v. State, supra. Here, the evidence is insufficient to rebut the State's assertion of readiness; nothing in the record indicates that the State could not have proceeded





to trial during the required time limits. Calloway v. State, 594 S.W.2d 440 (Tex.Cr.App. 1980); Compare Pate v. State, 592 S.W.2d 620 (Tex.Cr.App. 1980). Appellant's ground of error is overruled.

We have also considered the grounds of error raised in appellant's untimely filed pro se brief. We find these contentions without merit.

The judgment is affirmed.

W. C. DAVIS, Judge

Delivered September 17, 1986

En Banc

Publish

White, J. Not Participating

JOHN T. SATTERWHITE, Appellant

NO. 67,220 v. - - - - Appeal from BEXAR County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

For good and sufficient constitutional reasons Article 37.071,§(h), V.A.C.C.P., mandates this Court to review every judgment of conviction for capital murder in which punishment imposed is death. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In a word the objective of our review in any given cause is to assure that a decision to inflict the penalty of death upon the person convicted is free of "arbitrariness." Gregg v. Georgia, supra, U.S. at 204-206, S.Ct. at 2939-2940; or in two, that it "will not be 'wantonly' or 'freakishly' imposed." Jurek v. Texas, supra, U.S. at 276, S.Ct. at 2958. That is not to say those terms constitute standards or tests by which to assay particular grounds of error, just that they more or less contribute to an understanding of what to guard against in coming to an ultimate conclusion that the State has shown itself entitled to put a citizen to death.

Aside from specific grounds of errors, to me there is an aspect of this cause that is most troublesome: that at punishment testimony of an "expert" in such matters is presented to the jury in violation of appellant's constitutional right to assistance of counsel. My concerns go the heart of the verdict of the jury, the first on guilt and then both on punishment.

The ubiquitous James P. Grigson, M.D., testified in his own inimitable fashion, now well known to every experienced practitioner in capital cases. To find that "in light of other evidence presented," admitting his expert opinion on what is





literally a matter of life or death does not amount to reversible error is startling.

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), addressed comments on failure of an accused to testify. However, it drew the basic rule from Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 705 (1963), viz:

> "There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Id., at 86-87, [84 S.Ct. at ____,] 11 L.Ed.2d at 173."

Developing that proposition, the Chapman Court squarely concluded:

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless."

Id., at 23-24, 87 S.Ct. at ____, 17 L.Ed.2d at 710.

When the issue is punishment, this Court has similarly followed the Fahy test confirmed by Chapman. Clemons v. State, 605 S.W.2d 567 (Tex.Cr.App. 1980); also see Jordan v. State, 576 S.W.2d 825, 830 (Tex.Cr.App. 1978). Finding we could not say that evidence erroneously admitted was harmless beyond a reasonable doubt "given the number of years assessed by the jury," we buttressed that conclusion "by the prosecutor's request to the jury to consider this inadmissible evidence in assessing punishment, . . . . as well as what seems to us to have been the probable impact of the erroneously admitted evidence on the minds of an average jury during the punishment phase of the trial." Id., at 871-872.

Here too, the jury's answer to special issue two patently is based in part at least on testimony of Dr. Grigson, bolstered by

argument of the prosecutor reminding jurors that Dr. Grigson as a "Dallas psychiatrist and medical doctor [as compared to as mere psychologist employed by Bexar County]," and then recounting that "Dr. Grigson . . . tells you that on a range from 1 to 10 [appellant is] a ten plus," following that with an iteration of terms Dr. Grigson can explicate so expertly to jurors. Indeed, as in Clemons, supra, one may reasonably believe the State's case during the punishment hearing "could have been 'significantly less persuasive' had the evidence been excluded." Ibid.

Finally, a few words about voir dire of the lady who exclaimed, "You are telling me that in other words you don't have to defend yourself."[1] It is obvious that she did not ever recede from her spontaneously revealed bias (or prejudice depending on where one is coming from). When defense counsel asked her directly if she had "a bias against the law that says that the Defendant does not have to defend himself," she confessed, "I guess maybe I do," adding, "I haven't thought about that." Then came appellant's challenge for cause.

The prosecutor took over and after he broached the specific subject of the Fifth Amendment privilege in a lengthy discourse followed by a question, Coderman answered, "Yes." However, when the trial court asked for her answer, she responded, "Yes. I don't quite understand what he is saying." So the judge tried to explain burden of proof, ending with "and you must reach your verdict based on the evidence that is offered, not the evidence that is not offered." Coderman stated, "I think I can make a decision." Over protest of counsel for appellant, the judge

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1/ All emphasis supplied.





overruled his challenge.

Apparently following questions more than reactions to them, the majority opines that her statement to the court that she did not quite understand what the prosecutor was talking about, and her unresponsive enigmatic thought that she could "make a decision" "indicate that the juror was capable of following an instruction that she would not consider appellant's failure to testify or present evidence as any evidence against him." Yet, should we do that which the majority says it must do -- examine her voir dire in its entirety -- we would have to find that the veniresperson herself volunteered, in effect, that she believed the law personally abhorrent that an accused need not defend himself, and she failed to articulate any change in that bias by merely saying she did not understand what the prosecutor was saying and by telling the judge she thought she could "make a decision."

I would conclude the trial court erred in overruling a challenge for "bias or prejudice exists on the basic theory of law," which Coverman revealed, then admitted and never recanted.

For those reasons and also disagreeing with treatment of certain other grounds of error,[2] I respectfully dissent.

CLINTON, Judge

(Delivered September 17, 1986)
EN BANC
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2/ For one instance, while the majority may reach the correct result in approving overruling appellant's motion to suppress, its reasoning in some particulars is faulty. It is not enough that a peace officer is "authorized" by law to arrest any person found committing traffic offenses. A search or seizure issue will turn on what he actually did in the premises. Unless he makes a lawful custodial arrest, Belton v. New York (see majority opinion, at 7), is not applicable, and there can be no search or seizure incident thereto. Linnett v. State, 672 S.W.2d 672 (Tex.Cr.App. 1983).

JOHN T. SATTERWHITE, Appellant

NO. 67,220 vs. - - - APPEAL FROM BEXAR COUNTY

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

For those readers unfamiliar with the location of the City of Live Oak, Texas, the official highway travel map of Texas that I have reflects that it is contiguous to the City of San Antonio, and its boundaries lie on both sides of Interstate 35 (east). The well known City of Selma, see December, 1974 and November, 1976 editions of Texas Monthly, is located contiguously to the east of Live Oak.

The record reflects that on March 13, 1979, at 10:17 o'clock p.m., Live Oak Police Officer Mark Jackley was "working radar" on Interstate 35, presumably being on the lookout for "speeders" who might then be driving in excess of the posted speed limit of 55 miles per hour. Given the territory and the terrain, Jackley did not have to wait long to catch a speeder. Jackley clocked the speed of the vehicle that was shown to be driven by the appellant at 82 miles per hour.

Art. 6701d, §166 (a), V.A.C.S., provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential circumstances, then existing. However, driving a motor vehicle at a rate of speed in excess of the posted speed limit shall be prima facie evidence that the speed is not reasonable or prudent and is thus unlawful.





Section 148 of the statute, however, provides that the offense of speeding shall be the only offense in our traffic laws making mandatory the issuance of a written notice to appear in court; thus, the police may not, for this offense, take into custody the accused if he gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer. Two exceptions, which are not applicable to our facts, are if the speeding vehicle is licensed in a state or country other than Texas or if the speeding vehicle is being driven by a resident of a state or country other than Texas.

Based upon the radar reading, Jackley then pursued the vehicle later shown to be driven by the appellant in order to stop it and presumably to give appellant a speeding ticket, with him then being permitted to proceed on his way.

The appellant, however, did not stop his vehicle and, for reasons not reflected in this record, cut over into the grassy median area separating the north and south lanes of Interstate 35 where he then stopped his vehicle. Between the time when Jackley put on his warning lights, as well as when he was using his spotlight, until the appellant stopped his vehicle, there was much movement inside of the appellant's vehicle, which was then occupied by the appellant and a female passenger, by both the appellant and his passenger. The appellant then got out of the vehicle he was driving and walked to the rear of his car. Jackley's vehicle was then parked behind the appellant's vehicle. After Jackley approached the appellant's vehicle, he ordered the female passenger to remove herself from the car, which she did. Jackley then "patted down" both appellant and his female passenger "for weapons." No weapons were found. When asked for a driver's license, the appellant produced a temporary driver's license in the name of "Bobby Ted Satterwhite." The driver's license apparently did not arouse any suspicion on the part of Jackley. During

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this time, the female passenger started moving toward the driver's side of the door, but, after first disputing Jackley's command to stop, she then complied with his order to return to the rear of the vehicle which she had been riding in. The appellant also commenced getting closer to Jackley, but, upon command, he backed off.

Given the above facts and circumstances, it would appear that a reasonable, prudent police officer would have, when he got the appellant's vehicle stopped, if not before, called for a police back-up unit, or radioed for possible assistance to other law enforcement agencies, such as the Department of Public Safety, which also patrols this location. However, Jackley did no such thing.

Jackley, instead, notwithstanding the previous suspicious movements of the appellant and his passenger, decided to then search the interior of the vehicle that the appellant had been driving. While Jackley was looking under the car seats, "for weapons," both the appellant and his passenger started moving closer toward him and Jackley twice had to order them to back off to the rear of the car, which they did. Jackley, undaunted by the strange actions of the appellant and his passenger, continued searching the inside of the car. He eventually got to the glove compartment and after opening same, presumably with his back to the appellant and his passenger, found therein a pistol, which was later shown to be the murder weapon.

The appellant moved in the trial court to suppress the pistol as evidence, but the trial court overruled the motion.

Given the facts and circumstances of this case, as far as the initial stop, and as far as Jackley was concerned, there was only one violation committed, and that was the offense of speeding.

The majority opinion implicitly, but erroneously, holds that Jackley's stopping the appellant's vehicle for speeding then gave him the right to conduct a complete warrantless search of the vehicle, as an incident to the lawful arrest. Such holding flies in the face of our statutory law. As previously pointed out, if a police officer





stops a citizen motorist of this State for speeding and the citizen has a valid Texas driver's license and is driving a vehicle with Texas plates thereon, without more, the arresting officer is not permitted to do anything more legally than to issue a traffic citation and send the driver on his way. The majority opinion also holds that because the appellant failed to stop, Jackley had the right to make a custodial arrest of the appellant for violating the provisions of Art. 6701d, § 186 and 75, V.A.C.S., fleeing or attempting to elude a police officer and, get this, failure to yield to an emergency vehicle, Jackley's.

Given the facts and circumstances that went to the issue, I find that this kind of legal thinking and reasoning is preposterous and outlandish. Given a cursory reading of the cases cited by the majority opinion to support its position, they will simply not support its holdings.

The majority opinion does not end its ridiculous legal thinking and reasoning at this point; it plods forward and erroneously holds that Jackley had reasonable grounds to believe that he was in danger of bodily injury, thus giving him the right to conduct a complete search of the interior of the motor vehicle, "solely for his own protection." The majority opinion concludes: "[T]he officer was justified in believing he was in danger." Given the facts and circumstances of what occurred after Jackley stopped the appellant's vehicle, this conclusion is totally erroneous. How any rational human being can conclude under the facts that Jackley had a "fear" that his life might have been in danger is simply beyond my comprehension. The mere expression of a conclusion by a police officer that he was in fear should never be sufficient to authorize a warrantless arrest or a warrantless search of a person or his motor vehicle. Cf. Frazer v. State, 508 S.W.2d 342 (Tex.Cr.App.1974).

Clearly, Jackley's warrantless search of the glove compartment and the warrantless seizure of the pistol therefrom were unlawful under the Constitution and statutory laws of this State. To the majority

opinion's contrary holding, I respectfully dissent.

Miller, J., joins.

TEAGUE, Judge

EN BANC

DELIVERED: September 17, 1986

PUBLISH

# JOINT APPENDIX

No. 86-6284

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. SATTERWHITE,
*Petitioner*

v.

TEXAS

**On Writ of Certiorari to the Texas Court of Criminal Appeals**

## JOINT APPENDIX

RICHARD D. WOODS, P.C.
405 N. St. Mary's
Suite 242, Atrium
San Antonio, Texas
(512) 225-5762
STEPHEN TAKAS
126 Villita
San Antonio, Texas
(512) 225-5251
*Counsel for Petitioner*

JIM MATTOX
Attorney General of Texas
PAULA C. OFFENHAUSER
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas
(512) 463-2080
*Counsel for Respondent*

**PETITION FOR CERTIORARI FILED JANUARY 30, 1987**
**CERTIORARI GRANTED JUNE 1, 1987**

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## RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| | *District Court, Bexar County, Texas* |
| Apr 13, 1979 | ARRAIGNED PLEADS NOT GUILTY, TRIAL SET 5-29-79; re-trial 5-17. |
| Aug 27, 1979 | Defendant requested appointment of psychiatrist on issue of present competence, Dr. Cameron appointed. |
| Aug 30, 1979 | Hearing on Motion to Suppress. Defendant present with Attorneys. Authorities to be submitted, State offered testimony. |
| Sept 4, 1979 | Hearing on identification concluded. Subject to examination of Det. Arthur Trevino, witnesses Erin Octoberg and Kenneth Rodriguez may identify the defendant in court. Motion to suppress admissibility of pistol overruled. Issue of present competence with drawn by defendant. Motion for Continuance overruled. Jury voir dire began 4:30 P.M. recessed at 5:00 P.M. |
| Sept 17, 1979 | Indictment read at 9:11, defendant pleaded "Not Guilty." Witnesses sworn; rule invoked. Prosecutor made opening statement. State offered evidence. Recess at 4:26 P.M. Preston H Dial, Jr. Judge. |
| Sept 19, 1979 | Reconvened at 10:15, and defense rested. Both sides closed. Charge read to jury. Attorneys gave arguments. Jury began deliberations at 11:35. Jury returned verdict of "Guilty of Capital Murder" at 2:10. Trial proceeded to punishment phase. Recess at 4:00 P.M. |
| Sept 20, 1979 | States' testimony on punishment recessed at 10:15. State and defense rested at 3:04. Charge distributed. No objections. Charge read at 3:37. Attorneys gave argument. Jury began deliberation at 4:29. Jury returned verdict at 5:29 of "Yes" & "Yes". Jury polled, |

| DATE | PROCEEDINGS |
|---|---|
| | and each answered it was his verdict. Judgment pronounced. Defendant given 10 days for Motion for New Trial. Preston Dial, Jr. |
| Oct 11, 1979 | Defendant present with attorneys Woods and Takas. Testimony received on Motion for New Trial. Motion overruled. Judgment of conviction being subject to automatic review by the Court of Criminal Appeals sentence shall not to pronounced, but shall be suspended until the decision of the Court of Criminal Appeals has been received. Preston H. Dial, Jr., Judge. |
| | *Court of Criminal Appeals* |
| Sept 17, 1986 | Opinion rendered |
| Oct 1, 1986 | Motion for rehearing |
| Oct 16, 1986 | Response to Appellants Motion for Rehearings |
| Dec 19, 1986 | Order denying motion to file Appellant's motion for rehearing |
| Jan 28, 1937 | Order denying Appellants' motion to withdraw, Date of Execution and recall of Warrant of Execution and for Stay of Execution |



IN THE DISTRICT COURT
144 JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

No. NM 101969
NM 101970

THE STATE OF TEXAS

vs.

JOHN T. SATTERWHITE

---

**MOTION FOR PSYCHOLOGICAL EXAMINATION**

Filed: March 16, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the State of Texas, acting by and through its District Attorney, in the above styled and numbered cause and respectfully moves this honorable court pursuant to article 46.02 and 46.03 of the Texas Code of Criminal Procedure and also pursuant to decisions of the Texas Court of Criminal Appeals in *Livingston vs. State*, 542 S.W.2d 655 and *Moore vs. State*, 542 S.W.2d 664, to appoint a disinterested, qualified Psychologist, to examine the defendant with regard to his present competency to stand trial, his legal sanity at the time of the commission of the offense, and also with regard to the defendant's propensity for violence and dangerousness in the future as well as the likelihood of the defendant to commit future acts of violence.

Further, the State moves that this Court order the Sheriff of Bexar County, Texas to produce the body of said defendant at a time and location convenient to said

appointed Psychologist so that he may be examined pursuant to this order and evaluated.

Respectfully submitted,

BILL M. WHITE
Criminal District Attorney
Bexar County, Texas

By: /s/ Susan D. Reed
SUSAN D. REED
Assistant Criminal District Attorney
Bexar County, Texas



IN THE DISTRICT COURT
144 JUDICIAL CIRCUIT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

**ORDER**

Filed: March 16, 1979

On this 16 day of March, A.D., 1979, came on to be heard the *State's Motion for Psychological Examination* and having considered said Motion, this Court appoints Dr. Betty Schroeder to examine said defendant, JOHN T. SATTERWHITE and the Court hereby orders the Sheriff of Bexar County, Texas to produce the body of said JOHN T. SATTERWHITE at a time and place convenient to said Dr. Betty Schroeder for examination by said doctor.

It is so decreed.

/s/ H. F. GARCIA
Judge Presiding
144th Judicial District
Bexar County, Texas

## COMMITMENT

THE STATE OF TEXAS )
COUNTY OF BEXAR )

IN JUSTICE'S COURT
PRECINCT NO. ——

No. M 101969

To the Sheriff or any Constable of Bexar County—
GREETINGS:

YOU ARE HEREBY COMMANDED, that you take in custody and commit to the Jail of your County John T. Satterwhite charged with A felony, to-wit: Capital Murder on which charge above named person has this day by me been committed and safely keep unless said person gives good and sufficient bond in the sum of Remanded without Bond.

GIVEN UNDER MY HAND, This 15 day of March, 1979 (Issued same day)

/s/ Mary Elizabeth Ladd
Judge Municipal Court of
San Antonio, Bexar County,
Texas, Sitting as Magistrate



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

79 CR10853 B. CAP. MDR.

THE STATE OF TEXAS

vs.

JOHN SATTERWHITE

---

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JOHN SATTERWHITE defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel.

/s/ John T. Satterwhite
Defendant

Sworn to and subscribed before me on this, the 9 day of April A.D., 1979.

/s/ John Williams
Notary Public in and For
Bexar County, Texas

ORDER APPOINTING COUNSEL

On this, the 10th day of April, A.D., 1979, it appearing to the Court that the above named defendant has executed an affidavit stating that he is without counsel and is too poor to employ counsel, it is ordered that:

Honorable Rick Woods is hereby appointed to represent the above named defendant in said cause.

Signed this 12th day of April, A.D., 1979.

/s/ Preston H. Dial, Jr.
Judge Presiding

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## CERTIFICATE OF REPRESENTATION OF DEFENDANT AND REQUEST THAT COUNTY AUDITOR ISSUE PAYMENT WARRANT TO ATTORNEY

I certify that:

Honorable Rick Woods Attorney
Address 112 Villita
Social Sec. No. ——— - — - ———
Represented John T. Satterwhite Defendant
In Cause No. 79-CR-0853-B
He spent Nineteen/(19) 4-13-79, 5-16-79, 5-29-79
Day(s) Date(s)
8-27-79, 8-30-79, 8-31-79, 9-4-79, 9-5-79, 9-6, 7, 10, 11, 12, 13, 17, 18, 19, 20-79
10-11-79 in trial
and shall be paid $6,000.00 from the County Funds of Bexar County, Texas.

Please check the applicable box: Plea of Guilty[ ]
Jury Trial[XX]
Non-Jury Trial[ ] Dismissed[ ] Appeal[ ]
Capital Crime[XX]

I further certify that said attorney has not been authorized to receive any compensation for other appointive services, in this Court on any date indicated above.

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding

## CERTIFICATE OF COUNTY AUDITOR

This is to certify that provision has been made in the Budget and funds or will be, on hand to pay this obligation when due, or in order of registrar if payment is in scrip.

OLIVER LEWIS, JR.
Auditor
By: _____

[STATE SEAL]

PRESTON H. DIAL, JR.
District Judge
175th Judicial District
San Antonio, Texas 78205

April 13, 1979

The State of Texas
vs.
John Satterwhite
Cause No. 79CR0853B
175th Judicial District Court
Offense: Capital Murder

Rick Woods
Attorney at Law
112 Villita
San Antonio, Texas 78205

Dear Mr. WOODS:

You have been appointed by me to represent the above defendant. Your client is on bond.

It will be necessary for you to appear with your client for the Arraignment Docket in my Court at 9:30 A.M. on Friday, APRIL 13, 1979 you can avoid appearing at the Arraignment Docket call by completing the enclosed waiver forms, waiver of arraignment and waiver of speedy trial. You and your client should sign same and return it to me.

You should take immediate steps to visit your client to ascertain his or her desires. There is attached hereto a statement that you have met with your client. Please see that it is returned to the Court within ten (10) days of your receipt of this letter.

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding

COPY: 1 Presiding Criminal District Court
1 Criminal Assignment Clerk
1 District Attorney, Felony Section
1 Department of Court Administration



The State of Texas
vs.
John Satterwhite
No. 79CR0853B
In the District Court
175th Judicial District
Bexar County, Texas
Awtg Arrgn April 13, 1979

The Honorable Preston H. Dial, Jr.
Judge Presiding
175th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Sir:

I hereby acknowledge receipt of your letter notifying me of my appointment to represent the above defendant. I met with my client on the —— day of ——— 1979.

Signed: _____
Attorney at Law

IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

**MOTION FOR PSYCHIATRIC EXAMINATION**

Filed: April 17, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the State of Texas by and through its Criminal District Attorney of Bexar County, Texas and respectfully moves this Honorable Court pursuant to Article 46.02 and 46.03 of the Texas Code of Criminal Procedure and also pursuant to decisions of the Texas Court of Criminal Appeals in *Livingston v. State*, 542 S.W.2d 655 and *Moore v. State*, 542 S.W.2d 664, to appoint Dr. John T. Holbrook, qualified psychiatrist, and Dr. Betty Lou Schroeder qualified psychologist, to examine the defendant with regard to his present competency to stand trial, his legal sanity at the time of the commission of the offense, and also with regard to the defendant's propensity for violence and dangerousness as well as the likelihood of the Defendant to commit future acts of violence.

Further, the State moves that this Honorable Court order the Sheriff of Bexar County, Texas to produce the body of said Defendant for examination at a time convenient to said psychiatrist and/or psychologist so that he may be examined pursuant to this court order.



Respectfully submitted,

BILL M. WHITE
Criminal District Attorney
Attorney of
Bexar County, Texas

By /s/ Keith W. Burris
KEITH W. BURRIS
Assistant Criminal District
Attorney

IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

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**ORDER**

On this the 18th day of April, A.D., 1979, came on to be heard the *State's Motion For Psychological Examination* and having considered said Motion, this Court appoints Drs. John Holbrook and Betty Lou Schroeder to examine John T. Satterwhite and the Court hereby orders the Sheriff of Bexar County, Texas to produce the body of said John T. Satterwhite at a time and place convenient to said Drs. John T. Holbrook and Betty Lou Schroeder for examination and evaluation.

It is so decreed.

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding
175th Judicial District
Bexar County, Texas



**CORRESPONDENCE TO JUDGE PRESTON DIAL FROM JAMES P. GRIGSON, M.D.**

JAMES P. GRIGSON, M.D.
Expressway Tower, Suite 709
6116 North Central Expressway
Dallas, Texas 75206

---

EM 3-3015

May 8, 1979

Judge Preston H. Dial, Jr.
175th Judicial District Court
Bexar County Court House
San Antonio, Texas

Re: John T. Satterwhite

Dear Judge Dial:

The following is a summary of the psychiatric evaluation of John T. Satterwhite which took place in the Bexar County Jail on 5/3/79. The court order was explained to Mr. Satterwhite. He was informed of Judge Porter's ruling.

GENERAL APPEARANCE & BEHAVIOR: Mr. Satterwhite is a 33 year old colored male. His behavior was normal.

PRODUCTION OF SPEECH: He was able to reach goal ideas.

AFFECT & MOOD: There were no guilt feelings.

CONTENT OF THOUGHT: Mr. Satterwhite denied the charges against him. He was able to give historical information. No delusions nor hallucinations were elicited.

SENSORIUM: He was oriented to time, place and person. He is of average intelligence.

In conclusion, it is my opinion that John T. Satterwhite does have sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding and does have a rational as well as a factual understanding of the proceedings against him. At the time of the offense he was not suffering from a mental disease or defect that prevented him from conforming his behavior to the law. It is also my opinion he is a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence.

Sincerely,

/s/ J. P. Grigson, M.D.
JAMES P. GRIGSON, M.D.

[Filed May 18, 1979]



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

**MOTION TO RESTRICT ACCESS TO THE DEFENDANT**

Filed: May 29, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JOHN T. SATTERWHITE, Defendant in the above entitled and numbered cause, and moves the Court to enter its order that no person be allowed to interview or contact the Defendant without first obtaining the express written consent of his court-appointed attorneys; and in support thereof, would respectfully show unto the Court the following:

1. The Defendant stands charged with the offense of capital murder and has previously been interviewed by certain psychologists and/or psychiatrists at the State's insistence and request and without the benefit of counsel.

2. The Defendant fears that there will be subsequent efforts on behalf of the State to cause him to be interviewed by psychiatrists, psychologists, neurologists, or other medical experts or other police officers without the benefit of counsel being present.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court enter its order prohibiting the District Attorney and through the District Attorney, all State representatives, from conversing with, interviewing, or talking to the Defendant without first obtaining the written consent of defense counsel or a court order obtained only after an adversary hearing with notice to counsel for the Defendant.

Respectfully submitted,

/s/ Richard D. Woods
RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205
(512) 227-8236
Attorney for Defendant

(Certificate of Service Omitted in Printing)



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

**MOTION TO REQUIRE THE STATE TO DIVULGE THE NAMES OF ITS WITNESSES**

Filed: May 29, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JOHN T. SATTERWHITE, Defendant in the above entitled and numbered cause, and moves the Court to require the State to disclose the names of each and every witness which the State may call in this cause; and in support thereof, would respectfully show unto the Court the following:

1. That it is necessary for the defense counsel to know the potential witnesses which may be called by the State so that an endeavor to interview such witnesses may be made and thus counsel may render effective assistance as required by the Sixth and Fourteenth Amendments to the Constitution of the United States and by Article 1 § 10 of the Texas Constitution. Further, it is necessary to know the names of the witnesses and any potential witnesses that the State intends to call so that the prospective jurors may be made aware of the names and identity of potential witnesses and inquiry may be made as to the acquaintanceship of any such prospective jurors with any potential witnesses.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court order the State, through its prosecuting attorney, to provide the Defendant with the names and last known addresses of any and all witnesses

and/or potential witnesses which it may call in the trial of this case whether during direct evidence or in rebuttal, and that the State be required to disclose such name and addresses at least 60 days prior to trial.

Respectfully submitted,

/s/ Richard D. Woods
RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205
(512) 227-8236
Attorney for Defendant

(Certificate of Service Omitted in Printing)



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

**MOTION TO SUPPRESS**

Filed: May 29, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JOHN T. SATTERWHITE, Defendant, in the above entitled and numbered cause, and moves the Court to suppress the following evidence:

1. Any and all tangible evidence which would tend to connect the Defendant with the crime charged in the Bill of Indictment in that the same was gathered in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, Article 1 § 9 of the Texas Constitution and Texas Rules of Criminal Procedure, Article 38.22.

2. Any and all statements whether oral or written given by the Defendant to any person in connection with the criminal charges made a basis of this prosecution in that the same were gathered in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, Article 1 § 10 of the Texas Constitution and Texas Rules of Criminal Procedure, Article 38.22.

3. That in addition to all other oral or written statements, the Defendant specifically objects to the admission of any statement given to any psychiatrists, psychologists, neurologists or other medical experts, in that the same is inadmissible under the provisions of Texas Code of Criminal Procedure, Article 46.02 § 3(g), and Article 38.22.

4. Any and all identifications of the Defendant in Court or otherwise in that the same were secured through

an impermissibly suggestive line-up or display of pictures which was conducive to irreparable misidentification. That said procedure irretrievably tainted the identification of the Defendant both prior to and in all probability, at trial, and that such procedure denied the Defendant due process of law as is secured to him under the Fourteenth Amendment to the Constitution of the United States of America.

5. The testimony of any and all psychiatrists, psychologists or neurologists who have been appointed and/or who have examined the Defendant since the time of his arrest in March, 1979, for the present crimes in that the Defendant did not have defense counsel until April 13, 1979, to protect his rights, and that such examinations subsequent to his arrest but prior to appointment of counsel deny him effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1 § 10 of the Texas Constitution. The appointment of psychiatrists, psychologists or neurologists to examine the Defendant was a "critical stage" of the criminal proceedings against the Defendant at which point in time he was entitled to have counsel to represent his interests in connection with the selection and appointment of such alleged medical experts. Further, that the psychological testing made a basis of this Motion was secured by the District Attorney's office upon fraudulent misrepresentation to the District Judge who ultimately signed the order permitting examination in that the District Attorney represented to the Judge that the examination was being sought because it was believed that the Defendant was mentally incompetent, when in truth and in fact, the examination was being sought to secure information to be used against the Defendant in the penalty stage of the capital murder trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion be set down for hearing; that



upon hearing, the matters set forth herein be suppressed at the trial of this cause, at any competency hearing and/or trial, and that the prosecuting attorney and through such prosecuting attorney, all State's witnesses be prohibited from making any mention or allusion to any of the matters set forth in this motion.

Respectfully submitted,

/s/ Richard D. Woods
RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205
(512) 227-8236
Attorney for Defendant

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

(Title Omitted in Printing)

---

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes John Satterwhite defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel.

/s/ John T. Satterwhite
Defendant

Sworn to and subscribed before me on this, the 9 day of April A.D., 1979.

/s/ John Williams
Notary Public In and
For Bexar County,
Texas

ORDER APPOINTING COUNSEL

On this, the 25th day of July, A.D., 1979, it appearing to Court that the above named defendant has executed an affidavit stating that is without counsel and is too poor to employ counsel, it is ordered that: Honorable Stephen P. Takas is hereby appointed to represent the above named defendant in said cause.

Signed this —— day of Jul. 25, 1979 A.D., 19—.

/s/ John G. Benavides
Judge Presiding

Co-Counsel



CERTIFICATE OF REPRESENTATION OF
DEFENDANT AND REQUEST THAT
COUNTY AUDITOR ISSUE PAYMENT
WARRANT TO ATTORNEY

I certify that: Honorable Stephen P. Takas Attorney
Address 126 Villita
Social Sec. No. ———————
Represented John T. Satterwhite
Defendant
In Cause No. 79-CR-0853-B
He spent Sixteen (16) 8-27, 30, 31, -79
Day(s) Date(s)
9-4,5,6,7,10,11,12,13,17,18,19,
20-79 & 10-11-79 in trial
and shall be paid $5,500.00 from the County Funds of Bexar County, Texas.

Please check the applicable box: Plea of Guilty[ ]
Jury Trial[ ] Non-Jury Trial[ ] Dismissed[ ]
Appeal[ ] Capital Crime[XX]

I further certify that said attorney has not been authorized to receive any compensation for other appointive services, in this Court, on any date indicated above.

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding

CERTIFICATE OF COUNTY AUDITOR

This is to certify that provision has been made in the Budget and funds or will be, on hand to pay this obligation when due, or in order of registrar if payment is in scrip.

By: ———————
OLIVER LEWIS, JR.
Auditor

**NOTIFICATION AS TO APPOINTMENT OF COUNSEL**

[STATE SEAL]

JOHN G. BENAVIDES
District Judge
187th Judicial District
San Antonio, Texas 78205

July 26, 1979

Stephen P. Takas
Attorney at Law
126 Villita
San Antonio, Texas

CO-COUNSEL

The State of Texas
vs.
John Satterwhite
Cause No. 79CR0853B
175th Judicial District Court
Offense: Capital Murder

Dear Mr. Takas:

You have been appointed by me to represent the above defendant.

Said defendant, upon his appearance before the Court on APRIL 9, 1979, signed an affidavit stating that he is too poor to employ counsel.

This case will be tried on the merits on August 20, 1979 at 9:30 A.M., in the 175th Judicial District Court, Bexar County Courthouse, San Antonio, Texas.

Your client is (in Bexar County Jail).

/s/ John G. Benavides
JOHN G. BENAVIDES
Judge Presiding

COPY: 1 Presiding Criminal District Court
1 Criminal Assignment Clerk
1 District Attorney, Felony Section
1 Department of Court Administration



The State of Texas
vs.
John Satterwhite
No. 79CR0853B
In the District Court
175th Judicial District
Bexar County, Texas

Awtg XXX Trial August 20, 1979

The Honorable John G. Benavides
Judge Presiding
187th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Sir:

I hereby acknowledge receipt of your letter notifying me of my appointment to represent the above defendant. I met with my client on the —— day of —— 1979.

Signed: _____
Attorney at Law

IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

---

No. 79-CR-0852-B
No. 79-CR-0853-B

STATE OF TEXAS

vs.

JOHN T. SATTERWHITE

---

**MOTION IN LIMINE**

Filed Aug. 24, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JOHN T. SATTERWHITE, defendant in the above styled and numbered cause, by and through the undersigned court appointed attorneys, and requests this Court to enter his order granting this Motion in Limine and instructing the District Attorney and/or his assistants to not make reference to, allude to, or in any manner bring into evidence any of the following matters:

1. Any extraneous offenses.
2. Any conduct, declarations or acts of the alleged co-conspirator occurring after the commission of the offense and not res gestae to the offense, and otherwise hearsay or out of the presence or hearing of the defendant.
3. Any statements made by the Defendant while under arrest that do not conform to the requirements and provisions of Article 38.22, Texas Code of Criminal Procedure.



4. Any reference to, mention of or in an way alluding to the offering, the taking or the results of a polygraph or lie detector test.

Defendant states that all of the foregoing is inadmissible and constitutes prejudicial and inflammatory matters that might be brought out before the jury. Defendant here and now objects to any evidence in any of the foregoing categories and states they are not relevant and they are highly prejudicial and inflammatory and inadmissible.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the Court instruct the District Attorney and/or his assistants as requested above.

Respectfully submitted,

RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205

STEPHEN P. TAKAS, JR.
126 Villita
San Antonio, Texas 78205

By: /s/ Richard D. Woods
Attorneys for Defendant

IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

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(Title Omitted in Printing)

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**MOTION FOR PSYCHIATRIC EXAMINATION**

Filed August 24, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, JOHN T. SATTERWHITE, and moves the Court to appoint an independent psychiatrist, not one connected with the State of Texas or any agency thereof, to examine this Defendant for the purpose of determining his present mental competency to stand trial and to determine his sanity or insanity at the time of the alleged offenses, and in support of said motion would show the Court as follows:

I.

This Defendant is indigent and the undersigned attorneys were appointed to represent him.

II.

This Defendant, in preparation of his defense, needs to have an independent psychiatrist appointed to examine him from the defense point of view, and that said psychiatrist be instructed not to turn over any reports to the State of Texas or any agency thereof, and to confine the results of his examination to be released only to the Defendant or his attorneys.

III.

That this Defendant should not be examined by any other psychiatrist on behalf of the State, and that the



State of Texas should be instructed and ordered not to discuss any of the facts of this case, or the Defendant' mental competency, with the State of Texas, any doctor hired or employed by the State of Texas, or anyone attempting to interview this Defendant on behalf of the State of Texas.

IV.

That this Defendant has been unable to assist the attorneys in preparing a rational defense in his behalf and that he has been unable to remember or recollect a number of matters vital and necessary to his defense.

V.

It is necessary that these matters be commenced immediately in order to assist and help the attorney and the Defendant in preparing a rational defense in the Defendant's behalf.

Respectfully submitted,

RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205

STEPHEN P. TAKAS, JR.
126 Villita
San Antonio, Texas 78205

By: /s/ Richard D. Woods
Attorneys for Defendant

IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

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(Title Omitted in Printing)

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**CHARGE OF THE COURT ON PUNISHMENT**

Filed September 20, 1979

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the Defendant guilty of capital murder, as alleged in the indictment. You are instructed that a sentence of life or death is mandatory upon conviction of a capital offense. It now becomes your duty to determine, from all the evidence in this case, the answers to certain questions which are called in this charge special issues.

You are instructed that the State must prove each issue beyond a reasonable doubt.

By the term "deliberately," as used in a special issue is meant with careful consideration or deliberation; with full intent; not hastily or carelessly—as a deliberately formed purpose; with awareness of the consequences.

A person acts with intent with respect to the nature of his conduct, or to the result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

You are further instructed that in answering the issues submitted to you, you are to consider only the conduct and acts of this defendant and not the conduct and acts of parties, if any to the offense, if any, as heretofore charged in the guilt or innocence phase of this trial. You will confine yourselves, in answering the following issues to the conduct and acts of the defendant standing alone.



The special issues submitted to you are as follows:

*SPECIAL ISSUE I*

Was the conduct of the defendant that caused the death committed deliberately and with the reasonable expectation that the death of Mary Francis Davis would result?

*SPECIAL ISSUE II*

Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

You will answer each of these special issues either "yes" or "no".

In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.

Any juror who has a reasonable doubt that the answer is "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as to a special issue, then the answer of the jury is "no" regarding that special issue.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

During your deliberations you shall not consider, discuss or speculate upon what the effect of your answers to the above issues might be. Further, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor or how long this

defendant would be required to serve to satisfy a sentence of life imprisonment.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Respectfully submitted,

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

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(Title Omitted in Printing)

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**VERDICT FORM**

Filed September 20, 1979

*SPECIAL ISSUE I*

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, John T. Satterwhite, that caused the death of Mary Francis Davis was committed deliberately and with the reasonable expectation that the death of Mary Francis Davis would result?

ANSWER: Yes

*SPECIAL ISSUE II*

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, John T. Satterwhite, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Emma S. Gregoire
Foreman of the Jury

MINUTES, 175TH JUDICIAL DISTRICT COURT,
BEXAR COUNTY, TEXAS AT SEPTEMBER TERM,
A.D. 1979

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No. 79-CR-0853-B

Offense: Capital Murder

THE STATE OF TEXAS

vs.

JOHN T. SATTERWHITE

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**VERDICT AND JUDGMENT—CAPITAL FELONY**

On the 4TH day of September, A.D. 1979, the above styled and numbered cause being called for trial, appeared the parties, the State of Texas by her District Attorney, and the defendant, JOHN T. SATTERWHITE, in person and by counsel RICK WOODS & STEVE TAKAS, both parties having announced ready for trail; said defendant having heretofore been duly arraigned and entered a plea of "NOT GUILTY".

Thereupon a jury composed of EMMA S. GREGOIRE nad eleven others were selected, empanelled and sworn, and after hearing the indictment read, the defendant's plea of not guilty thereto and the evidence submitted, and having been charged by the Court as to their duty to determine the guilty or innocence of the defendant, and heard the arguments of counsel thereon, they retired in charge of the proper officer and returned into open Court, in due form of law, on the 19TH day of September, A.D. 1979, the following verdict which was received by the Court and is now entered upon the Minutes:



"We, the Jury, find the defendant, John T. Satterwhite, guilty of the capital murder.

/s/ Emma S. Grgoire
Foreman"

Thereupon, in accordance with the law, after further evidence was heard on the issue of punishment, and after having been charged by the Court as to certain special issues, and heard arguments of counsel thereon, the jury retired in charge of the proper officer and returned into open Court, in due form of law, on the 20TH day of September, A.D. 1979, the following finding and answers upon the Minutes;

*SPECIAL ISSUE 1*

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, John T. Satterwhite, that caused the death of Mary Francis Davis was committed deliberately and with the reasonable expectation that the death of Mary Francis Davis would result?

*ANSWER: "YES"*

*SPECIAL ISSUE 2*

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, John T. Satterwhite, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: "YES"

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Emma S. Gregoire
Foreman of the Jury"

It is therefore, CONSIDERED, ORDERED and ADJUDGED by the Court that the defendant, John T. Satterwhite, is guilty of the offense of CAPITAL MURDER, as has been determined by the Jury, that said defendant, John T. Satterwhite, committed said offense on March 12, 1979, as has been determined by the Court and that he be punished, as required by the Statutes of the State of Texas, by DEATH.

It is further ORDERED by the Court that the State of Texas do have and recover of and from said defendant all costs of prosecution for which execution may issue and the defendant be remanded to jail to await the further order of this Court. Defendant requested the Statutory ten (10) days to file a Motion for a New Trial.

SIGNED AND ORDERED ENTERED THIS 21 DAY OF SEPTEMBER, A.D. 1979.

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding



IN THE DISTRICT COURT
175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

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(Title Omitted in Printing)

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**FIRST AMENDED MOTION FOR NEW TRIAL**

Filed October 4, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, JOHN T. SATTERWHITE, by and through his court-appointed attorneys of record and moves the Court to grant him a new trial and in support of said motion would show unto the Court the following:

I.

That the Court has committed material error calculated to injure the rights of the defendant in a number of particulars, to-wit: in refusing to grant the defendant's Motion for Mis-trial as a result of the State's intentional injection into the cause of a statement signed by the accomplice witness, Sharon Rene Bell, with its attendant consistency with her testimony thereby having the bolstering effect with evidence that is inadmissible to bootstrap, support or in any other manner to attach some decree of verity to the accomplice witness's unimpeached testimony.

II.

That the Court further committed material error calculated to injure the rights of the defendant in overruling the defendant's Motion to Suppress the pistol admitted into evidence, which said exhibit was obtained by

the officers of Live Oak Police Department in violation of Article 1, Sec. 9, 10, 19 & 29 of the Constitution of the State of Texas, and also in contravention to the Fourth, Fifth, Sixth & Fourteenth Amendments to the Constitution of the United States of America.

III.

That the Court has committed material error calculated to injure the rights of the defendant by refusing to dismiss and set aside the indictment in this cause on the grounds that the State has engaged in "selective prosecution" of certain cases without any logical basis whatsoever. Such invidious discrimination, has as its objective the exclusion of all female defendants from active prosecution of capital murder. Such reasons for the abandonment of seeking the death penalty on the basis of homosexuality or female gender, is of an improper prosecutorial design and thereby basing an unjustifiable standard arbitrarily classified. Due to the State's refusal to fulfill its duty to bring all violators to justice, the defendant states that such selective enforcement is in violation of the Equal Protection Clause and grounds for dismissal of this cause for capital murder.

IV.

That the Court has committed material error calculated to injure the rights of the defendant in denying the defendant's Motion in Limine suppressing Dr. James P. Grigson's testimony as a result of the absence and improper admonitions and predicating warnings prior to any and all interviews with the defendant which as a result thereof, the witness based his findings and accordingly rendered his opinion through his sworn testimony in Court. Such "baited" warnings that the results of the interview could either "hurt or help" the defendant are in direct contravention with any such warnings held allowable since the United States Supreme Court decision of Miranda v. Arizona. No prior notice was tendered to



defense counsel although the State was fully cognizant that the defendant had counsel prior to seeking and obtaining a Court Order allowing any psychiatric and/or psychological interview or testing of the defendant in this cause. As such, any testimony derived, elicited and brought forth to the jury as a result of such interviews in any manner could in direct violation of Article 5561h, V.A.T.S. Secs. 2 & 4, in addition to and being in violation of the rights of the defendant under the Constitution of the State of Texas, Article I Secs. 9, 10, 19 & 29, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

V.

That the verdict is contrary to the law and the evidence in that the State had wholly failed to prove sufficient corroborative evidence of the accomplice witness, Sharon Bell's testimony intending to connect the defendant with the offense committed. The corroboration in the instant case show the commission of the offense in addition to the defendant being at the place of offense within approximately thirty minutes from the time that the murder should have been committed in addition to disclosing the defendant's presence with the accomplice witness, Sharon Bell, but the same does not in any manner, connect the defendant with the offense committed. As such, without more, a verdict of guilty is wholly and completely contrary to the law and the evidence as presented in this cause.

WHEREFORE, PREMISES CONSIDERED, the defendant prays that after hearing on said Motion that the Court grant him a new trial and for such other relief to which he show himself justly entitled.

Respectfully submitted,

RICHARD D. WOODS
112 Villita
San Antonio, Texas 78205

STEPHEN P. TAKAS, JR.
126 Villita
San Antonio, Texas 78205

By: /s/ R. D. Woods
Attorneys for Defendant

(Certificate of Service Omitted in Printing)



IN THE DISTRICT COURT
BEXAR COUNTY, TEXAS

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(Title Omitted in Printing)

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May 29, 1979

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THE COURT: Let's look at them, then. You have a Motion to Suppress all tangible evidence. I think you need to specify a little more than all tangible evidence which would connect the Defendant to the crime. I need to know exactly what you are talking about that has been gathered in violation of the constitution.

MR. WOODS: The particular reference being made, Your Honor, of course that was a general ground alleged but I'm making more specific reference to paragraph Number 3 with respect to admissions or statements to any psychiatrist, psychologist or any medical expert.

THE COURT: Paragraph number one will be overruled.

• • • •

THE COURT: All right. At this time I will grant Paragraph Number 2 without prejudice to the State, if there is, if it turns out there is some oral statements that you think are admissible you can advise counsel and advise the Court and we'll have a preliminary hearing out of the presence of the jury.

MR. WOODS: That is a time well in advance of any offer being made before the jury insofar as the contents of the statements.

THE COURT: I would certainly prefer doing it before a jury is empaneled but sometimes these things don't come up until the last minute. I'm just precluding

the State from offering it without giving notice to the Court and counsel.

Now, Paragraph Number 3, in addition to all other oral or written statements, the Defendant specifically objects to the admission of any statement given to any psychiatrist, psychologist, neurologist or other medical experts. What you are saying is a statement given by the Defendant to a doctor?

MR. WOODS: The Defendant was arrested on Thursday, the exact date I don't know at this time. I can't recall, but the following Monday or over the weekend Dr. Schroeder was already interviewing with him and Dr. Grigson was already down here from Dallas to interview him.

Now, I don't think he talked to Dr. Grigson but I know my client had talked to Dr. Schroeder. What was said I don't know that either, because that of course is confidential, at least so far as I have been able to determine. I have yet to see any report from Dr. Schroeder on it. I can only go on my past of viewing Capital Murder trials, at least within the last year or so I have seen Dr. Schroeder testify. This is one thing. I'm going to object to any statements or admissions if he did make them.

THE COURT: The Court doesn't know any reason why that would be confidential but a conversation while the Defendant is in custody has some built-in obstacles before it would be coming into evidence.

Again, we should have a hearing out of the presence of the jury. I will grant paragraph three, again without prejudice to the State finding out what, if anything, you have and advising the Court and Counsel. We'll have to have a hearing on paragraph four. If there were any sort of line-ups. We probably could do that this week.

MR. WOODS: That would be fine.

THE COURT: I'll grant you a hearing on paragraph five after the State determines if they have any



testimony under that. The motion for an order to require the State to disclose prior acts of misconduct. I assume this is the prior criminal record that they would be entitled to introduce at the punishment phase, if there is such a disparity that counsel be informed of the same.

THE COURT: You are entitled to have the names endorsed on the indictment and that's really all I'm granting right now.

Motion to Restrict access to the Defendant. All right. The motion to Restrict access to the Defendant. The last paragraph says, I want to make sure I understand the word. There is a little typographical error here. Order prohibiting the District Attorney and through the District Attorney all State representatives from conversing with, talk, T-A-L-I-N-G, is that talking?

MR. WOODS: Yes.

THE COURT: Talking with the Defendant without first obtaining written consent of defense counsel or Court order obtained only after adversary hearing after notice to the Defendant.

I think it's reasonable to have the defense attorney present if you want to talk to the Defendant. If you want to attempt to talk to the Defendant. I'll grant it to that degree. By state representatives, I assume you mean representatives of—

MR. WOODS: Not the legislature No.

THE COURT: But of the—

MR. WOODS: That would apply to Mr. Garcia who is Sharon Rene Bell's Court appointed attorney though he of course is a State Representative I would want that definitely to apply to him.

MR. WOODS: Your Honor, the content of that Motion to Restrict goes also to the psychologist and psychiatrist, whatever medical experts they would intend to have him interviewed, examined, whatever, I would want this motion to apply.

THE COURT: I'll just say if the State wants to have the Defendant examined by a psychiatrist or a psychologist that will be permitted if you notify defense counsel so that he can be present if he wants to. Motion for Jury List will be granted. All right. The Court will appoint additional counsel.

MR. WOODS: Thank you.

THE COURT: All right. I'm looking at your motion for restriction of course we have a pre-trial motion we would have to have some hearing outside the presence of the jury.

• • • •

DIRECT EXAMINATION

THE COURT: Does the defense request anything more than an instruction to Dr. Schroeder to not testify to any communications with the Defendant?

MR. WOODS: Well, I believe the first inquiry needs to be made of the witness as to what predicated insofar as what information was conveyed between the alleged patient and the doctor at that time. Before I can make any further objection or instruction to the testimony.

THE COURT: I'll let you inquire.

VOIR DIRE EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. WOODS:

Q. Dr. Schroeder, my name is Richard Woods one of the attorneys appointed and I have never met you but I have heard about you. You had a conversation and conference with John Satterwhite?

A. Yes. I did.

Q. Okay. Prior to having this conversation with him did you give him any warnings or tell him what you were doing was going to be used in Court against him?

A. Yes. I did.



Q. How did you tell him this?

A. Discussing it with him and I keep a little card in my billfold that I refer to the Miranda warnings.

Q. What kind of card do you keep in your billfold, do you have that available?

A. I have it back in the other office. I keep it in my billfold at all times.

Q. You don't carry your billfold with you at all times?

A. All times except I don't have it now.

THE COURT: Is it one of the cards the police department issues?

THE WITNESS: I got it from them. Yes.

THE COURT: The Court will take notice that contains the Miranda Warning.

ON BEHALF OF THE DEFENDANT

BY MR. WOODS:

Q. And you gave Mr. Satterwhite the Miranda warnings so to speak that he had a right to have a lawyer to be present during this?

A. Yes. We discussed it and even I asked him to sign a release in order that I might appropriately release the information he was to give me.

Q. Did he sign the release?

A. He did.

Q. And did he have a conversation with you?

A. Yes. Rather lengthy one.

Q. How long did that last?

A. I have seen him on a number of occasions. On that particular occasion I would say probably no more than an hour or hour and fifteen minutes.

Q. And he at no time during this interview or conference asked that a lawyer be present or anything of that nature?

A. No. Not at that time.

Q. What date was this that you saw him and you gave him this warning?

A. I believe I received the order and executed it on the same day, March the 16th, 1979.

MR. WOODS: All right. Thank you, doctor.

• • • •

THE COURT: Dr. Schroeder, in testifying before the jury do not relate anything that the Defendant might have told you.

THE WITNESS: I understand.

THE COURT: You may bring the jury.

MR. HARRIS: Nor anything about offenses. We are talking about one offense. Don't say anything about his cases or we won't ask you about any specific details but we are trying one case and the jury doesn't know about any other cases.

THE WITNESS: I understand.

THE COURT: Bring the jury.

• • • •

WHEREUPON, the following proceedings were had in the presence and hearing of the jury as follows:

DIRECT EXAMINATION

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. Would you state your name please for the jury?
A. Betty Lou Schroeder.
Q. What is your profession, please
A. I'm a clinical psychologist.
Q. By whom are you employed?
A. Bexar County as well as I'm self employed.
Q. What are your duties with Bexar County?
A. Under Court order I examine certain clients as designated by the Judge or requested of me. I understand there is a blanket order that all individuals apply for probation maybe asked to be examined by me in terms of probation requirements.



Q. That's a portion of your duties?
A. Yes.
Q. Of what does your private practice consist?
A. I do a great deal of psychotherapy with individuals having all kinds of emotional, mental psychiatric disorders.
Q. Okay.
A. Group therapy, alcoholic counseling, that kind of thing.
Q. How long have you been employed by Bexar County?
A. On a contract basis since 72. As Bexar County employee specifically since 73.
Q. Would you tell the jury what educational background or qualifications that you have that would qualify you for your position?
A. I'm and under graduate and have a graduate degree from St. Mary's University here in San Antonio. PhD in psychology at the University of Texas at Austin. I belong to the National, State and local association for clinical psychologists.
Q. Have you been qualified to testify in the District Courts of Bexar County?
A. Yes, I have.
Q. In connection with your duties as a clinical psychologist with Bexar County have you had occasion to meet the Defendant in this case, John T. Satterwhite?
A. Yes. I have.
Q. Do you recall when the first time you met him was?
A. I believe it was March 16th, 1979.
Q. Where did you meet him?
A. Bexar County Jail.
Q. What was the purpose, how did you have occasion to meet him?
A. I received an order from the Judge. This was the presiding judge of the 144th Judicial District to so examine him.

Q. That would be Judge Garcia?

A. That's correct.

Q. Now, would you tell the jury the procedure that you use in an ordinary case when you see a person like this in the Bexar County Jail, what do you do, what methods do you use to conduct or do what you do so to speak?

A. Do you want me to include testing techniques or just the procedures before the test begins?

Q. Before testing begins.

A. If an individual is in there and has already been say convicted of an offense, is seeking probation I just have a regular release that they sign, an ordinary kind (Indicating) that I have their permission to not only test them but to release information that at my professional discretion if the individual has not been tried I be careful to give them the kinds of warnings that are necessary so their rights may be protected.

Usually I talk with them. In addition to formally stating to them and I ask them to sign a release. In addition I also tell them I will be in Court and would be testifying in regard to the information that I have received.

Q. Then what method do you use when you actually talk to them, do you use the interview method?

A. Interview as well as just a general clinical assessment as well as objective test techniques.

Q. Did you follow the procedures that you have outlined for us in the case of John T. Satterwhite?

A. Yes, I did insofar as I was able to at that particular time.

Q. Did that of course include advising him of his rights?

A. It did.

Q. Did he sign a release?

A. He did.

Q. Did you either that day or some later date conduct any psychological or clinical testing?



A. I did that day conduct some psychological testing. I saw him on a number of occasions after that. And also sent my psychological associate over to conduct some tests after that and it was refused.

Q. I'm sorry.

A. I understand. On the day I originally saw him on March 16th I conducted various objective and standardized test techniques myself. Thereafter I saw him on a number of other occasions trying to finish other things in more finer detailed information and whatever, which he refused.

He did not want either that or he had numerous other reasons. Several times he was too sleepy. Sometimes it was too early and sometimes it was too late. I couldn't seem to hit it right.

Q. Were you able then to complete any tests?

A. Yes. I was on the day I originally saw him on March 16th.

Q. Can you give us, tell us what type of tests that you conducted, the purpose of the tests?

A. I will correct one thing. He did complete the Wide Range Arithmetic Test later with a psychological associate.

He had a clinic interview, Bender-Gestalt and he did the Wide Range Arithmetic Test and thereafter refused any objective testing.

Q. I am very vaguely familiar with the tests that you mentioned. The jury may be also. Could you tell us first of all, what is the Bender-Gestalt Test, what is the purpose of that test?

A. There are a number of things that can be done with the Bender-Gestalt. It's a simple looking instrument, ten designs on cards.

You present them one at a time and ask the individual to copy them. Make his as much like these that he sees as possible. From these you can make a number of kinds of not conclusions but preliminary kinds of assessments of intelligence and assessment as to whether the indi-

vidual is able to follow instructions, what visual perception problems he might have, what level of intelligence, if any possible psychosis or thought disorder exists. That was one instrument. Shall I go on?

Q. Did you conduct that test on this Defendant John T. Satterwhite?

A. I did.

Q. Was the next one the Rorschach?

A. Rorschach Technique.

Q. Is that the Ink Blot Test?

A. Yes. It is.

Q. Would you explain to the jury what that is and what it's purpose is?

A. The Rorschach Technique are ten ink blots that have been standardized for well over a hundred years. There are many things that can be assessed from the Rorschach Technique. It's a very fine instrument with limitations but still a very excellent one.

It enables one first of all from one level of assessment to get an indication of the individual's ability to relate to a problem, how he approaches the problem, whether he approaches it in a wholistic manner as a whole design or does he work it in details or excessively impulsive answers, a variety of questions, kind of vocabulary, able to use and speak the language, but most importantly and in this case it was very obvious after a few minutes that this man had average intelligence or whatever.

I was very interested in attempting to get behind the mask that most of us wear in an attempt to hide our deeper feelings and projected technique, in this case is quite good.

Q. You mentioned the Wide Range Arithmetic Test. Did you go into that?

A. I did not do this. It was given at a later date by my psychological associate.

Q. Was it done under your supervision though?

A. Yes. He received a score of 405, grade, one month which is well on par with other expectations. Then I



filled out an information sheet on March 16th of background, family, schooling, that kind of thing.

Q. Did you see the Defendant John Satterwhite on any other occasions?

A. Yes. I saw him on a number of other occasions.

Q. Are you saying March 16th, that's 1979, this year?

A. That's correct.

Q. Approximately how many other times; let me back up. How long did you see him. what length of time on March 16th?

A. About an hour and fifteen minutes as I recall on the first occasion on March 16th.

Q. How many other occasions have you seen the Defendant, John T. Satterwhite?

A. On April the 8th I sent my psychological associate over at my directions and he was—

MR. TAKAS: I don't think that's responsive to the question he asked her. How many times did she see him.

THE COURT: Overruled.

MR. TAKAS: Note my exception.

THE WITNESS: She indicated to me that he gave her an answer which was evasive and he did not care to participate at that time.

MR. TAKAS: That's hearsay, too Judge.

THE COURT: Sustained.

MR. TAKAS: I ask that the jury be instructed to disregard the last statements.

THE COURT: The Jury is so instructed.

MR. TAKAS: Not withstanding the instruction of the Court we feel prejudicial harm has been accomplished. We move mistrial at this time.

THE COURT: Denied.

MR. TAKAS: Note our exception to the Court's ruling.

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. Have you yourself seen him any other times?

A. As I recall I saw him the next day because I wanted to complete the Wechsler Scales and some of the ordinary objective tests that I would like to have for my file.

And he indicated I believe at that time that he was too tired and did not want to continue it. I would have to estimate a few days later. I can only say three or four. I approached him again. I usually go over very early in the morning and he felt he was too sleepy, approaching the same day as I recall and he felt it was too late. He was too tired. He was too hungry. There was a number of other occasions.

I saw him a couple of weeks ago, maybe three weeks ago, approximately. I was going to make one last attempt to add other tests to the evaluation and he refused.

On June 4th he was also seen by my psychological associate again, so there was a number of occasions.

Q. Based on your experience as a clinical psychologist and based upon your clinical interview, the tests that you administered and the observations that you have made of this Defendant, John T. Satterwhite, have you come to any conclusions, can you tell the jury anything about his character?

A. In my opinion he had average intelligence. I estimated I.Q., speaking in terms of figures at approximately one hundred. It could be slightly more but since he did not care to respond to the Wechsler Scales I couldn't estimate that.

His vocabulary was quite good and able to relate well. He was very evasive, very guarded individual. He has a phasod, an outer covering of very polite and cooperatibility, smiling, pleasant, cooperativeness.

The guardedness that I saw in many respects and very cunning kind of guardedness. In fact he examined the



release with such tenacity that I was really surprised. He even told me a few things because I was questioning why he made a multitude of marks on the back of it. He told me of other experiences he had where he felt his rights had been violated.

MR. TAKAS: I object, Your Honor, it is in violation of the Order of the Court.

THE COURT: Sustained.

THE COURT: Do not go into conversation.

MR. TAKAS: We ask the jury to be instructed to disregard that testimony.

THE COURT: The jury is so instructed.

MR. TAKAS: Not withstanding the unresponsive, unsolicited answer by this witness, notwithstanding the Court's instruction, it is so prejudicial and harm has been done to this case. We move for a mistrial at this time.

THE COURT: Denied.

MR. TAKAS: Note our exception.

MR. TAKAS: Can we have an instruction to this woman to just stick to what she was asked?

THE COURT: She's been instructed. Proceed.

THE COURT: You may ask your question again Mr. Harris.

BY MR. HARRIS:

Q. Based upon your examination of the Defendant and based upon your testing, your experience, can you tell us something about the Defendant's character as well as his personality?

A. The phasod of cooperativeness. He is a cunning individual, very evasive, very guarded. A user of people. Particularly noticeable was his lack of ability to feel what other people feel. An inability to feel what we call empathy.

If you can feel empathy you don't hurt because you know what it feels like to be hurt or you can project yourself into another individual and understand their needs and make your appropriate modification or behavior.

This was noticeably lacking as a character disorder. A further discussion with him tended to verify that he has a very immature development of conscience. He's particularly unable to feel feelings of guilt. The moral substructure, his ability. He knows right from wrong very well but he chooses by virtue of his own wish to perform wrong.

He tends to be an individual who has a rather bold representation of himself, particularly as a male. His masculinity, sexuality. It was my opinion that beneath this kind of representation was a very insecure individual who had very real doubts about his own ability to perform.

Q. These characteristics in the field of psychology, do they have a label or type of name that you would call a person like that?

A. Yes, it does.

Q. What is that label or name?

A. 301.7, according to our international code in antisocial personality.

Q. In addition to the testing you have done and interview with the Defendant, did you also have access to certain records concerning his past?

A. Yes. I did.

Q. Based upon those records and based upon your interview and based of course upon your qualifications and experience as a clinical psychologist do you have an opinion as to whether or not there is a probability that this Defendant will be a continuing threat to society through acts of criminal violence?

A. In my opinion he will be a continuing threat.

MR. HARRIS: Thank you, Doctor. We'll pass the witness.

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THE COURT: Cross examination.

## CROSS EXAMINATION

## ON BEHALF OF THE DEFENDANT

BY MR. TAKAS:

Q. Did you have an occasion you visited him for an hour and fifteen minutes; is that correct on the 15th of March?

A. Approximately. I don't recall exactly but approximately.

Q. That was the only time that you had conversation with him?

A. I believe I just related a number of other times I had conversation with him.

Q. But he refused or decided that pursuant to his rights he didn't want to talk to you for various reasons from that point on?

A. In most cases it wasn't in regard to his rights. It was with regard to some physical conditions such as being hungry, being tired, it being too early or too late.

Q. Did you warn him of his rights at every subsequent visit?

A. I don't recall that I did.

Q. Were you aware of a Court order signed in May asking you to inform counsel for the Defendant when you did that?

A. An order in May? I only have a copy of one order and it's dated March 16th.

Q. Did you ever make an attempt to get hold of his attorneys and talk to his attorneys about the possibility of speaking to my client?

A. No.

Q. Did you know he had an attorney appointed to represent him?

A. I assumed it would be so. At the time I originally saw him on March 16th I don't believe an attorney had been appointed. We talked about that I believe.

Q. Did you cause to run any psychological evaluations on the co-defendant in this case?

A. I'm sorry?

Q. Did you do any psychological evaluations on the co-defendant in this case?

A. Are you referring to Sharon Bell?

Q. Yes, ma'am.

A. Yes.

Q. Did you reach a conclusion as to her psychological stability?

A. Yes.

Q. Did you say that she was a noncredible witness, her testimony would lack credibility.

THE COURT: Just a moment.

MR. HARRIS: I object to that question as not being relevant.

THE COURT: Overruled.

ON BEHALF OF THE DEFENDANT

BY MR. TAKAS:

Q. Did you come to the conclusion that after discussing with her that she was a person whose relations, what she related to you lacked a certain amount of credibility?

A. Yes.

Q. Are you still of that opinion?

A. Yes.

Q. Do you make mistakes, ma'am?

A. We all do. I'm only human.

Q. Have you done this type of testimony before in various types of cases such as this?

A. I'm called upon on various occasions to perform these kinds of duties.

Q. Did you testify in Sharon Bell's trial?

A. Have I testified?

Q. Do you plan to?

A. I don't know what my assignments will be from day-to-day. I didn't know I was to be here this morning until yesterday afternoon.



Q. If called to testify in Sharon Bell's trial you would have to relate what your clinical opinion was in that?

A. If any Judge orders me to do something I'll do it within the constraints of moral turpitude.

Q. In that opinion would be that her story lacks credibility?

A. I have trouble hearing you. I'm sorry.

Q. Your opinion would be that you arrived at would be that Sharon Bell's story lacks credibility from your evaluation of her?

A. I don't have the evaluation of her here but I can assure you that I have some doubts about Miss Bell on a number of areas.

MR. TAKAS: Thank you. Pass the witness.

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WHEREUPON,

DOCTOR JAMES GRIGSON

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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THE COURT: I'll permit the defense to examine.

VOIR DIRE EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. WOODS:

Q. Dr. Grigson, my name is Richard Woods. We have never met. I'm one of the attorneys that is appointed to represent the Defendant, John Satterwhite I have a few questions I would like to ask you if I may, sir. When was the first time or have you examined the Defendant John Satterwhite?

A. Yes, sir. I have.

Q. And on what day did you examine him?

A. I first attempted to examine him on March the 19th of this year but the first time I was able to examine him was May 3rd of this year.

Q. And prior to the examination did you give any type of admonitions to him in the way of warnings?

A. Yes, sir. I did. I explained to him on both occasions the purposes of the examination in terms of the three questions, that I was primarily doing the evaluation in order to determine the question of competency, the question of sanity or insanity and the question of whether or not he presented a continuing threat to society, whether or not there was a question as to propensity of violence, dangerousness.

I also, after explaining what those three questions meant, explained to him that I did state that there was a Federal Judge by the name of Judge Robert Porter in Dallas who had ruled in cases in a case where if an individual was charged with Capital Murder that they had the right or the option to remain silent or to simply refuse the examination and no psychiatric examination would take place. Now, I did give him all of that on both occasions.

Q. And in response to your admonitions on both occasions did he at any time agree to confer with you?

A. Yes, sir. He did.

Q. Did you at any time tell him that whatever or the results of your conference or interview with him could be used against him in a court of law?

A. I told him with regard to the question of dangerousness that if he were to be found guilty of Capital Murder that then in the second phase of the trial, in the punishment phase, that if I found him or any psychiatrist who examined him found him to be dangerous that this could be used in testifying with regard to the case. It could result in his getting possibly the Death Penalty.

Q. Well, now I don't mean to belabor the point.

A. Yes, sir.



Q. But you can understand why we are asking the questions?

A. Yes, sir.

Q. Did you specifically tell him though that as a result of his conferring with you that the fruits of that conference or interview could be used against him?

A. No, sir. I didn't use those words. I did say that it could be harmful to him or it could be helpful to him depending upon what the findings would be.

Q. I see.

MR. WOODS: Okay. Thank you, Doctor.

MR. WOODS: I will at this time, pursuant to that new section in the session laws, Your Honor, that is privileged, Article 5861 H Section 2, no exception laying under section 4-A sub-4, in that the Defendant has not waived in writing such privilege.

THE COURT: Doctor, I'm going to instruct you not to testify as to communications—

DR. GRIGSON: Yes, Your Honor.

THE COURT: —that the Defendant may have told you.

A. Yes, Your Honor.

THE COURT: Don't relate to the jury anything that he may have told you. You may relate your opinion. You may be asked a hypothetical question based on what is already in evidence about the Defendant but we'll ask two things, that you not relate to the jury anything that the Defendant might have told you nor make any reference to more than one charge that might be against him.

THE WITNESS: Okay, Your Honor.

THE COURT: I don't know if that information was conveyed to you but as far as the jury is concerned there is just one trial and it has to do with one specific offense. Now, have you discussed this with Dr. Grigson, have you had an opportunity, Mr. Harris?

MR. HARRIS: No, sir. I haven't had an occasion to talk to him at all.

MR. TAKAS: The Court is going to allow him to testify as to his opinion based upon facts he derived in violation of the statutes of the State of Texas, in further violation of his right against cross-examination and confronting a witness against himself in that the testimony and the opinion was gathered from words uttered after he was promised something of value for him in violation of cases that say you can't do that.

THE COURT: I have difficulty understanding if you are making an objection or arguing with me, Mr. Takas. Why don't you tell me what's—

MR. TAKAS: He testified.

THE COURT: The way you work it is you object to something, not is the Court going to do such and such. Go ahead.

MR. TAKAS: I object to him testifying at all.

THE COURT: That's overruled.

MR. TAKAS: Let's get this in the record that for the reason that what he is basing his testimony on, his opinion is evidence and facts obtained from the Defendant in violations of the Defendant's rights in that he's required, not only the additional requirement under the new statute but under the old statute to warn him that it can be used against him.

Case law has held that you cannot obtain evidence with a promise that it will help him. He testified under oath that, "I told him it could be used against him and it also could help him". And for that reason alone you are going to have to stop his testimony.

THE COURT: Overruled.

MR. TAKAS: Note our exception.

THE COURT: Feel free to interpose other objections after questions propounded to the doctor and we find out what he is basing his testimony on.

MR. TAKAS: Can we go ahead and ask the doctor instead of going on as we have seen him do in the past and Mr. Harris ask questions that can be answered in the affirmative or negative and not let this long narrative



testimony that was allowed this morning with Dr. Schroeder.

THE COURT: We can eliminate with respect to qualifications and what have you but I'll say the bottom line that you are going to ask of Dr. Grigson with respect to the Defendant. Do you have your question more or less phrased?

MR. HARRIS: No, not other than do you have an opinion as to whether or not the Defendant there is a probability, the wording of the statute, will be by acts of criminal violence be a continuing threat to society.

THE COURT: All right. I'll permit him to testify and you may make whatever objections you wish at the time the questions are asked. Bring the jury.

MR. WOODS: So I understand the Court's ruling, you are admonishing the witness though to be first responsive to the questions propounded. Secondly, that he's not to allude to or convey to this jury any information that was mentioned or any words uttered by this Defendant during any interviews or conferences?

THE COURT: That's the substance of what I told him.

MR. WOODS: I just wanted to make sure I have it in my mind, of course we except to the Court's ruling in denial of the other objection and the rest of the objection.

THE COURT: All right.

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WHEREUPON, the following proceedings were had in the presence of the jury as follows:

THE COURT: Proceed.

DIRECT EXAMINATION

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. State your name, please for the jury?
A. James P. Griggson.

Q. What is your profession, please?
A. I'm a medical doctor. I specialize in psychiatry.
Q. Where do you live?
A. Dallas, Texas.
Q. Would you tell the jury your educational background and your qualifications?

A. Yes, sir. I obtained my M.D. Degree from Southwestern Medical School, branch of the University of Texas located in Dallas.

I then spent one year in rotating internship at Baylor Medical Center in Dallas. At the end of that time I decided to go ahead and specialize in psychiatry. I spent the next three years in the approved Psychiatric Residency Training Program.

This was divided. There was 18 months and Timberland Hospital in Dallas, 18 months at Parkland Hospital in Dallas. I was Chief of Psychiatry Residents during my third year at Parkland.

After I completed the required three years I then went into full time teaching in the Department of Psychiatry at the medical school in Dallas. I taught there full time for four and a half years. During that period of time I was consultant to a State Hospital system for two years. I was consultant to Texas Women's University Health Center for two years. I was consultant to the Dallas County Health Department for three years.

I have been out in private practice now a little over twelve years. I continued to teach at the medical school in the Department of Psychiatry. However, it is on a limited basis now.

I am certified by the American Board of Neurology and Psychiatry and licensed to practice medicine in the State of Texas and is on file in Dallas County.

Q. For the record would you tell us what the medical speciality of psychiatry involves, what does that mean?

A. Yes, sir. Psychiatry is that field of medicine that primarily is interested in the way a person thinks, feels, their behavior. It is also has to do with treatment of



various illnesses in those three areas, of course research in those areas as well.

Q Have you testified in Court before?
A. Yes, sir. I have.
Q. And in what types of courts have you testified?

A. I've testified in Federal Courts, Judicial District Courts, misdemeanor type courts, probate courts, civil courts.

Q. In Dallas County or in other counties?

A. Oh, in Dallas County and almost all over the State of Texas and the surrounding states.

Q. Now, let me ask you whether or not you know the Defendant in this case, John T. Satterwhite?
A. Yes, sir. I do.
Q. When did you meet Mr. Satterwhite?

A. I first saw Mr. Satterwhite on March the 19th, 1979.

Q. How did you have occasion to meet him, why did you meet him that day?

A. I had a Court order at that time requesting a psychiatric examination of Mr. Satterwhite.

Q. You did see him on that date, March 19th?
A. Yes, sir. I did.
Q. Were you able to conduct an examination or interview with John T. Satterwhite?
A. No, sir. I was not.
Q. Why not?

MR. WOODS: Objection. I object on the grounds that we set forth in the pre-trial hearing or the motion or the hearing held on the pre-trial motion such grounds.

THE COURT: I'll sustain the objection.

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. Did you see Mr. Satterwhite sometime after that?
A. Yes, sir. I did.
Q. On what date?
A. This was May the 3rd of this year.

Q. And did you have occasion then to examine him on that date?

A. Yes, sir. I did.

Q. What is the method or the procedure that you use in practicing your medical specialty, that is psychiatry?

A. It's called psychiatric examination or mental status examination.

Q. How is that conducted?

A. Well, the psychiatric examination was developed in order to examine an individual in three areas. Thinking, feeling and behavior. However, if a person has a physical condition, hardening of the arteries, blood clot on the brain, brain tumor, metabolic or an infectious disease that would effect either thinking, feeling or behavior then of course it will show up in this type of an examination.

The examination itself is divided into five different parts. The first is called a general appearance and behavior. This is simply observing the individual from the time they walk into the interview room until the time they leave, paying particular attention to the way they walk, the way they are dressed. The way they sit.

If you take the two primary symptoms that you encounter in psychiatry you're primarily talking about tension and depression. A severely depressed individual, their walk is slower. They don't pick there feet up off the floor as high as normal, usually the shoulders are slouched, forehead bent down while sitting.

There is very few body movements. The other extreme, an individual that is extremely tense or an individual that is in an aggravated state of depression, their walk is more rapid, more jerky. While sitting there is some type of constant body movement going on, sort of fidgety like a small child.

The second part of the psychiatric examination is called production of speech. This is really the most difficult part of the examination to explain or to teach. The



reason for it being that normally when somebody is talking to you you are listening to what they are talking about rather than the way their thoughts come out.

Each type of mental or emotional disorder does have a particular type of thought flow. One that you are probably more familiar with is that which you encounter in the aging process. If we all live long enough we'll get hardening of the arteries. When that happens there is decreased oxygen and blood flow to the brain. When that happens we then start repeating ourselves. We ramble. We beat around the bush. This is a particular type of thought flow that is caused by the hardening of the arteries.

Then the third part of the psychiatric examination is called affect or mood. All this is is a reflection of the individual's emotional state, their feelings. If a person is talking to you about something that is sad, normally you can see this in the facial expressions. You can hear it in the tone and quality of the voice. Of course the same would be true if they are talking to you about something that is pleasant. Normally you can see this in the person's face and you can hear it in their voice.

The fourth part of the examination is called content of thought. Here you get historical information which includes birth, early development, educational history, service, occupational, family medical history.

Then of particular importance we have an individual that is charged with a criminal offense, is the ability of that person to discuss what they were doing on, around or about the time of the alleged offense.

I assume that if they will give me that information they will be able to give that same information to their attorney; so if they do have a defense to the charges they would be able to aid their attorney in preparation of the defense. Also in this particular part of the examination you determine the presence or absence of delusions or hallucinations.

A delusion is a false consent within the mind such as individual thinking. They are Napoleon. When they are not or thinking people are trying to kill them when nobody is, whereas the hallucinations involve one of your five senses. Either hearing, seeing, smell, taste or touch. An individual that hears voices where no voices exist, that would be an auditory hallucination. Most of the time when people fake, these are the areas that they fake in, but you have to have an underlying primary illness in order to have these secondary symptoms.

Then the last part of the psychiatric examination is called the sensorium. This is really what most lay people think of as the actual psychiatric examination, yet it really makes up a very small part of the total examination. It has to do with is the individual oriented as to time, place and person. All that means is do they know who they are, where they are, what is going on about them and also it covers recent and remote memory, intellectual function, attention span and concentration but it's really with the five different areas put together that a competent psychiatrist should be able to determine how the individual is functioning from an emotional or mental standpoint.

Q. Did you have occasion on May 3rd of this year to conduct such an examination with the Defendant John T. Satterwhite?

A. Yes.

MR. WOODS: We of course interpose the same objection on the same grounds based upon the hearings of the grounds of the pre-trial motion that this matter should be excluded.

THE COURT: Overruled.

MR. WOODS: Exception.



ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. Prior to your exception or evaluation of John T. Satterwhite, did you advise him of anything?

A. Yes, sir. I did.

Q. What did you advise him of?

A. I advised him of the Court's order and the purpose of the psychiatric examination including the question of, number one, whether or not he was sane or insane at the time of the offense. And I clearly stated to him that it was my understanding from a legal standpoint that that meant did he have a rational as well as a factual understanding related to the proceedings against him and also whether or not he had sufficient present mental ability to advise with his attorneys with a reasonable degree of rational understanding. That is with regard to the competency. I'm sorry I explained that as being whether or not he was competent to stand trial. With regard to whether or not he was sane or insane at the time of the alleged offense.

I told him that what this meant in terms of my understanding from the legal side was that whether or not he was suffering from a mental disease or defect that would have prevented him from conforming his behavior to the law. I stated the third question had to do with whether or not there was a question as to whether or not he presented a continuing threat to society, whether this was violence, whether or not he was dangerous or could be considered dangerous.

After explaining those three questions to him I then told him, I said, Mr. Satterwhite, there is a Judge in Dallas, a Federal Judge by the name of Judge Robert Porter who has ruled in cases where an individual who is charged with Capital Murder, that the Defendant has the right to remain silent or that he can simply refuse the psychiatric examination and no examination will take place.

I also told him that due to the fact that he was charged with Capital Murder, that should he be found guilty of Capital Murder that there would be a second part to the trial having to do with sentencing and if there was a question in the second part of the trial that had to do with the question of whether or not he presented a continuing threat to society, whether or not he was dangerous and that if I or any other psychiatrist examined him and found him to be dangerous that this could be harmful to him in that part of the trial. If on the other hand he were found not to be dangerous then of course it could be beneficial to him from that standpoint.

Q. Did Mr. Satterwhite seem to understand your admonitions or warning?

A. Yes, sir. He understood what I said.

Q. Following those warnings or admonitions did he consent to the examination or evaluation?

MR. WOODS: I interpose the objection because the conference is in violation of Defendant's 5th Amendment right, United States Constitution and Constitution of the State of Texas and also in controversion on the same grounds we alleged in our pre-trial motion with regard to psychiatric and psychological evidence in this cause.

THE COURT: Overruled.

MR. WOODS: Note our exception.

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. Would you tell the jury what the results were of the first portion of the examination, that is that dealing with general appearance and behavior?

A. Yes. Mr. Satterwhite appeared to me to be about the age of a 33 year old black male. At the time he had a slight goatee. I believe a slight mustache. His behavior, as far as the way he walked, the way he sat, the



way he was dressed was all appropriate and normal. There was nothing abnormal, within that category.

Q. Of course without telling us any conversation that may have occurred, could you tell us the results of your examination as to production of speech?

A. Yes. Mr. Satterwhite's thought came out in a logical, rational sequence. This is what you consider normal. There was nothing abnormal there. It was just normal thought flow.

Q. Likewise what were the results of your examination towards affect and mood?

A. For the most part Mr. Satterwhite was pleasant and was cooperative. There was one area of considerable significance. That was an absence of any type of guilt feelings. There was times when you would have expected, in view of what was being discussed, you would have expected the person to have shown remorse, regret, shame, embarrassment, some form of guilt. There was absolutely no signs whatsoever of any type of guilt or remorseful feelings.

Q. What were the results of the four portions of the examination, that is the content of thought?

A. He was able to give me historical information. There were no delusions nor were there any hallucinations. He was able to discuss with me the charges against him.

Q. And the fifth part, that is sensorium?

A. Mr. Satterwhite was oriented. We knew who I was, where he was. He knew what was going on about him. He's of average intelligence. His attention span, concentration span were within normal limits. There was nothing abnormal with regard to that area.

Q. Did you come to a conclusion then based upon your experience in psychiatry and based upon your examination of the Defendant as to whether or not he was competent to stand trial?

A. Yes, sir. I did.

Q. What was that opinion?

A. It was my opinion, based upon the psychiatric examination that he was competent to stand trial.

Q. Likewise, did you reach a conclusion or come to an opinion as to whether or not he was insane at the time of the offense?

A. Yes, sir. I formed an opinion with regard to that.

Q. What was that opinion?

A. It was my opinion that he was sane at the time of the alleged offense.

Q. The third question, did you form an opinion based upon your examination of Mr. Satterwhite as to whether or not he would be a continuing threat to society by acts of criminal violence?

A. Yes, sir. I formed an opinion with regard to that.

Q. What is your opinion?

A. Yes. It's my opinion that Mr. Satterwhite will present a continuing threat to society by continuing acts of violence.

Q. Is there some type of label or name that you give?

A. They are only interested in their own self-pleasure and gratification.

They repeatedly break the rules and regulations of the laws. Those are the outstanding characteristics. Just simply a lack of conscience and only interested in what they want.

Q. Are all people under that classification the same degree?

A. No, sir. They are not.

Q. Different degrees?

A. Yes, sir. There are.

Q. How or what type of range do you use?

A. Well, you could use a scale of say 1 to 10 where you would have individuals say at the one level are relatively, mild sociopaths. They only break small rules. Then you could start going up the scale where you have individuals that may be all they will ever do is do burglaries or these type of crimes.



Then as you go up you get into acts of violence, rape, a assaultive behavior. Then at the top of the scale, say an individual that is a 10, these are individuals that have complete disregard for another human being's life. These are the people who needlessly take another person's life.

Q. Based upon your examination of Mr. Satterwhite and based upon your expertise in the field of psychiatry, do you have an opinion as to where Mr. Satterwhite fits in that scale?

A. Yes, sir. I do.

Q. What is that opinion?

A. That he would be ten plus. He would be as severe a sociopath as you can be.

Q. Would you consider him to be dangerous then?

A. Absolutely.

Q. Is there any cure or rehabilitation for severe antisocial behavior person?

A. First, with the regard to cure, it's not an illness so there is no treatment. There is nothing that can be done as far as medicine in psychiatry as far as rehabilitation. There has been no form of rehabilitation that has been successful with an individual when they get to this point in life where if they take another human being's life then there is nothing that can be done to modify or change their behavior.

Q. Of course that would be on the outside. That wouldn't apply in a prison setting, would it?

A. Yes, sir. His behavior will continue regardless where he is, regardless whether he's inside of prison or outside of prison.

MR. HARRIS: Thank you very much, Doctor. Pass the witness.

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## CROSS EXAMINATION

## ON BEHALF OF THE DEFENDANT

BY MR. TAKAS:

Q. Doctor, you make it a point to say that you were under Court order to examine somebody or a person in jail; is that correct?

A. I had a Court order requesting the examination.

Q. The Court order was requested by the District Attorney's office; is that correct?

A. Yes, sir. It was.

Q. You appear in trials down here specifically at the request of Mr. Barrera acting for Mr. White, the District Attorney's attorney of this County; is that correct?

A. I would have appeared here for the defense. I mean on both.

Q. You appeared here—just answer my question yes or no.

A. I'm sorry. I didn't understand you.

Q. You appeared here today at the request of Mr. Harris?

A. Yes, sir. I am.

Q. Who is paying you to appear here today?

A. The county.

Q. What is your fee?

A. $80 per hour.

Q. $80 per hour. Does that run from the time you got on the airplane this morning?

A. No, sir. From the time I left my office.

Q. What time did you leave your office?

A. About ten minutes after twelve.

Q. And they paid you $80 an hour to see this Defendant in the jail; is that correct?

A. Yes, sir. For the examination. Yes, sir.

Q. So Mr. Harris in effect has hired you through the District Attorney's office; is that correct?



A. No. In the examination I sent the bill to the Judge, so I assume that I was paid through the Courts. I don't know.

Q. Let me ask you this. Are you familiar with the case styled Smith versus Estelle?

A. Oh, very much so. Yes.

Q. Are you a party to that case in any shape or form?

A. No. I testified against him after.

Q. Are you familiar with a amicus curiae brief filed against you, sir?

A. Against me?

Q. Yes, sir.

A. There has never been a case filed against me, sir.

Q. Was your mention of five other competent psychiatrists, they don't approve of the tactics you display?

A. No. That's a misquotation, sir.

Q. It is?

A. Yes, sir.

Q. Are you a member of any professional organizations, American Psychiatric?

A. Yes, sir. I'm a member of the Dalls County Medical Society, the Texas Medical Association, and the American Medical Association which in August gave me the physician.

Q. I didn't ask I don't want you to go into your glory routine. Do you belong to any psychiatric organization?

A. Yes, sir. I'm a member of the North Texas Psychiatric Society, the Texas Psychiatric Association and the American Psychiatric Association.

Q. How do your colleagues in the American Association feel about your competency, ability to testify in this area?

A. In August of this year I received the American Psychiatric Associations Psychiatrist Award. Now—

Q. Now, specifically let me ask you this, did you receive another reward where four psychiatrists testified, not testified but joined in a brief filed in Smith

versus Estelle stating that they did not approve of your methods?

A. No. Now, you are talking about the group that said homosexuality is normal and they are opposed to the Death Penalty. Now, this same group is also opposed to my testifying like this here today.

Q. So, you are not implying those people are abnormal that would take a stands against you?

A. Oh, I think homosexuality is a sickness.

Q. That is not what I asked you.

A. I'm sorry.

Q. You are not implying that people that take stands against you are abnormal are you?

A. I don't know that anybody has ever taken a stand against me.

Q. Four other doctors did.

A. No, sir. Not against me.

Q. Against the way you practice?

A. Well, they wouldn't turn around and give me the Physician and Psychiatric—

Q. I'm talking about these four other doctors.

A. Oh, I'm sure that they perhaps don't agree with me necessarily but I don't know that they are opposed to me.

Q. The majority of your practice is testifying in courts; is that correct?

A. No, sir. The majority of it is legal psychiatry.

Q. Legal psychiatry?

A. Yes, sir.

Q. Legal psychiatry is that type of psychiatry that is practiced to prepare for some form of Court action; is that correct?

A. Yes, sir. It is.

Q. What is your business other than psychiatry?

A. I have patient loads?

A. I try to see six patients a week.

Q. Are you familiar with any program that people that have been sociopaths have been cured?



A. There is no programs where severe sociopaths have been cured.

Q. You are not familiar with a program instituted in the state of Maryland?

A. Are you talking about treatment of severe sociopaths? There is no program for severe sociopaths.

Q. That you know of?

A. With severe sociopaths there are none.

Q. What you are saying, if there is one you haven't heard of it?

A. No, sir. In all the reviews that have been done with regard to your severe sociopaths those people who have disregard for other human beings life, there has been none that have been reported in any way at all successfully.

Now, it is true that there has been research done with regard to the milder sociopaths. These are individuals that can be helped.

Q. Is that correct?

A. No. The Federal Government has been spending millions of dollars for a number of years to try to find something to do with these people.

MR. WOODS: Pass the witness.

• • • •

MR. HARRIS: No further questions.

THE COURT: You are excused.

COURT OF CRIMINAL
APPEALS OF TEXAS

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No. 67,220

JOHN T. SATTERWHITE,
*Appellant*

v.

THE STATE OF TEXAS,
*Appellee*

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Appeal from BEXAR COUNTY

---

**OPINION**

September 17, 1986

This is an appeal from a conviction for the offense of capital murder. The punishment is death.

The appellant contends that the trial court erred in overruling his motion for new trial. He asserts that the State selectively discriminated against him in violation of the due process and equal protection clauses of the Fourteenth Amendment by prosecuting him for capital murder. The appellant contends that he was sexually discriminated against since females in similar situations received more lenient treatment.

At a hearing on the appellant's motion for new trial, three attorneys, who had practiced criminal law in the county, testified. One of them stated that he felt it was the prosecution's practice to seek greater penalties for men than women. Another stated that it was his experience that females got better deals than males. Finally, appellant's counsel testified that in every case he had seen where the co-defendants are male and female, the female always got the better deal. The State presented no evidence.



In order to establish a constitutional violation by the selective prosecution of a defendant, it is necessary to show more than mere unequal application of a state statute. As the Supreme Court stated in Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 466 (1962):

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case imply a policy of selective enforcement, it was not stated that the selection was *deliberately* had upon an unjustifiable standard such as race, religion, or other arbitrary classifications. (Emphasis added)

Therefore, it is necessary that the accused show an intentional or purposeful discrimination in the enforcement of the statute against him. A discriminating purpose will not be presumed; a showing of clear intentional discrimination is required. Armendariz v. State, 529 S.W.2d 525 (Tex.Cr.App. 1975); S.S. Kresge Co. v. State, 546 S.W.2d 928 (TexCiv.App., Dallas, 1977); Super X Drugs of Texas, Inc. v. State, 505 S.W.2d 333 (Tex.Civ.App., Houston, 1974); Enntex Oil and Gas Co. (of Nevada) v. State, 560 S.W.2d 494 (Tex.Civ.App., Texarkana, 1977). The appellant has failed to show actual or purposeful discrimination. His ground of error is overruled. Also see U.S. v. Hayes, 589 F.2d 811 (5th Cir. 1979); U.S. v. Heilman, 614 F.2d 1133 (7th Cir. 1980); U.S. v. Diggs, 613 F.2d 988 (D.C.Cir. 1979); U.S. v. Larson, 612 F.2d 1301 (8th Cir 1980); U.S. v. Choate, 619 F.2d 21 (9th Cir. 1980).

In two grounds of error the appellant argues that the trial court erred by refusing his challenge for cause to a prospective juror. The appellant contends that this prospective juror admitted having a bias or prejudice

against a law upon which the defense was entitled to rely. See Art. 35.16(c)(2) V.A.C.C.P. Appellant argues that the juror had a bias against allowing a defendant not to testify or defend himself. During voir dire of venireman Mavis Corderman, the following occurred:

ON BEHALF OF THE DEFENSE

BY MR. TAKAS:

Q. Now, you have heard people talk about presumption of innocence. The presumption of innocence that every person is presumed innocent until proven guilty, do you understand that concept or do you believe you understand that concept.

A. Yes, sir.

Q. So to say what it means is that I don't have to say anything to disprove his guilt. I do not have to take any affirmative action to say I'm not guilty. I do not have to answer accusers because I'm innocent and the law presumes I'm innocent and the Constitution of the State of Texas and United States of America says I am innocent and until they lift that cloak of innocence by fair and competent evidence. Do you have any quarrel with that concept?

A. You are telling me that in other words you don't have to defend yourself.

Q. If you have a quarrel with that say it. My mother has a quarrel with it.

A. Well, I guess I do. I don't know if I would call it quarrel, but—

Q. Do you have a bias against the law that says that the Defendant does not have to defend himself?

A. There again, I guess maybe I do. I haven't thought about that.

Q. Okay.

MR. TAKAS: We challenge for cause, Judge. Bias or prejudice exists on the basic theory of law.



THE COURT: Do you wish to inquire?
MR. HARRIS: Yes, sir.

• • • •

ON BEHALF OF THE STATE

BY MR. HARRIS:

Q. There are a number of ways a defendant can defend himself. One of those ways can be merely asking questions of the witnesses against him, that being cross examination. I think the real question is the 5th Amendment to the United States Constitution says a person shall not be required to testify against himself or offer evidence against himself.

What that means is you will be instructed in a case where a defendant does not testify, you are instructed that you cannot and must not, first of all, it says you are instructed that the Defendant in this case has elected not to testify. You are instructed that you must not and you cannot consider that as any evidence against him. The mere fact that he did not testify. Do you think you could follow an instruction like that?

A. Yes.

THE COURT: What was your answer?

THE WITNESS: Yes. I don't quite understand what he is saying.

THE COURT: Let me see if I can help you a little, Mrs. Corderman.

BY THE COURT:

Q. The Defendant doesn't have to prove his innocence. We have talked about presumption of innocence.

A. Right.

Q. The State has the burden of proving his guilt which means they have to put on the evidence. He doesn't have to put on anything. If he and his at-

torneys think it's better for him to just sit there and see what they do, the law permits him to do that and you must reach your verdict based on the evidence that is offered, not the evidence that is not offered.

A. I think I can make a decision.

MR. TAKAS: Judge, I don't think that is a correct statement.

THE COURT: I will overrule the challenge for cause. You may question.

MR. TAKAS: Note my exception for challenge for cause and you are overruling it.

Article 35.16(c)(2), supra, provides:

> A challenge for cause may be made by the defense for any of the following reasons:
>
> • • • •
>
> (2) That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof on the punishment thereof.

In order to determine if a venireman was subject to a challenge for cause, we must examine the testimony given by the venireman on voir dire in its entirety. Evert v. State, 561 S.W.2d 489 (Tex.Cr.App. 1978). In reviewing the testimony given above, we conclude that the appellant has failed to establish that the prospective juror was subject to challenge for cause pursuant to Art. 35.169(c)(2), supra. The testimony of the juror elicited from both the prosecution and the trial court indicate that the juror was capable of following an instruction that she would not consider the appellant's failure to testify or present evidence as any evidence against him. The record does not support the appellant's contention. See Von Byrd v. State, 569 S.W.2d 883 (Tex.Cr.



App. 1978), cert. denied 441 U.S. 888; Simmons v. State, 594 S.W.2d 760 (Tex.Cr.App. 1980); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980) Compare Pierce v. State, 604 S.W.2d 185 (Tex.Cr.App. 1980); Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978); *Evert v. State*, supra. His grounds of error are overruled.

The appellant in his next ground of error contends that the trial court erred in overruling his motion to suppress evidence seized by Officer Jackley. The appellant argues that a pistol, subsequently shown to be the murder weapon, was unlawfully seized.

Officer Jackley testified that he was a police officer with the Live Oak Police Department. On March 13, 1979, he was clocking the speed of automobiles with radar on a highway. At approximately 10:17 p.m., he noticed a vehicle traveling at eighty-two miles per hour. The officer immediately pulled behind the vehicle and turned on his overhead lights and emergency lights. The automobile did not stop but did slow down to about sixty-five miles per hour. The car was traveling in the left lane of a divided four-lane highway and no attempt was made by the driver to move over to the right lane. Officer Jackley flashed his high beams to attract the attention of the driver. He noticed that the passenger kept turning around to look back at him and that the driver kept adjusting the rear-view mirror. He stated that there was generally a lot of movement in the car. He then turned his spotlight on the car to see the movement and get their attention. Jackley testified that the passenger looked as if she were bending over in the seat and the driver continued to fidget with the mirror.

The officer pursued the vehicle for about one mile when suddenly the vehicle quickly exited the highway to the left onto the grassy median and came to a stop. The area was dark and Officer Jackley was alone. He radioed the dispatcher his location and stepped from his vehicle. The appellant stepped out from the driver's side and approached the back of his automobile. Officer Jackley then

asked the female passenger, Sharon Bell, to also get out of the automobile. She complied with his order and the officer turned them around and began to pat them down for weapons. He stated that the pair acted in a very nervous fashion. Bell asked Jackley what he was doing and he told her that he was checking for weapons. Bell immediately became quiet and then started walking toward their automobile. She walked toward the driver's side where the door was still open. Officer Jackley ordered her to stop but she continued to walk on toward the open door. Again, he ordered her to stop as she reached the door and she stopped. She started to say something and the officer ordered her to return to the back of the vehicle.

Officer Jackley sat down in the driver's seat of the appellant's automobile and felt around the seat. As he was doing this, the pair walked around to see what he was doing and he ordered them to get back. The officer then opened the glove box and found a pistol. The officer stated that he believed the pair was armed and that he was in fear of his life. The pistol was admitted in evidence at trial.

The appellant argues that the weapon was seized pursuant to an unlawful search. We do not agree.

In the present case, there can be no question that Officer Jackley's initial stop of the automobile appellant was driving was valid and proper. The officer saw that the traffic violation of speeding had occurred. Art. 6701d, § 166, Vernon's Ann.Civ.St.; Borner v. State, 521 S.W.2d 552 (Tex.Cr.App. 1975). Additionally, the officer saw the appellant fail to stop his vehicle after being given a signal to stop, Art. 6701d, § 186, supra, and appellant improperly stop the vehicle. Art. 6701d, § 75, supra. Therefore, the officer was authorized to stop the vehicle and arrest any person found committing the traffic offenses. Art. 6701d, § 153, supra; Art. 14.01(b) V.A.C.C.P. Furthermore, since Officer Jackley had seen



the commission of a traffic offense other than the offense of speeding, he, in addition to arresting the appellant, was authorized to take the appellant into custody. Christian v. State, 592 S.W.2d 625 (Tex.Cr.App. 1980) (opinion on rehearing, cert. denied 446 U.S. 784, 100 S.Ct. 2966, 64 L.Ed.2d 841 (198-); Tores v. State, 518 S.W.2d 378 (Tex.Cr.App. 1975).

The Supreme Court, in New York v. Belton, 29 Cr.L. 3124 (1981), recently stated the following:

> [N]o straightforward rule has emerged from the litigated cases respecting the question involved here —the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.
>
> * * * *
>
> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, the court here found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests that generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' *Chimel*, supra, at 763. In order to establish the workable rule this category of cases requires as we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant

> of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

We conclude that Officer Jackley's search of the vehicle was a search incident to arrest and was therefore lawful. Furthermore, we believe that even if the appellant's arrest at the time of the search was not custodial, it would, nonetheless, be lawful.

We have acknowledged that an officer should be permitted to take every reasonable precaution to safeguard his life in the process of making an arrest, even though the arrest is initially non-custodial. See Lewis v. State, 502 S.W.2d 699 (Tex. Cr. App. 1973). If, under the totality of the circumstances presented to the officer, he has reasonable grounds to believe that he is in danger of bodily harm or that the person he encounters is armed and dangerous, only then will justification for such a search exist. *Lewis v. State*, supra.

In the case at bar, the evidence reflects that the officer had reasonable grounds to believe that he was in danger of bodily injury and the limited search was conducted solely for his own protection. In light of the evidence of the case, the hour of the night, the movement inside the car, and the actions of occupants after the stop, we conclude that the officer was justified in believing he was in danger. The area searched by the officer was one in which the occupants could have easily reached and obtained a weapon. Imhoff v. State, 494 S.W.2d. 919 (Tex. Cr. App. 1973); *Lewis v. State*, supra, *Borner v. State*, supra. Compare Wilson v. State, 511 S.W.2d 531 (Tex. Cr. App. 1974); Keah v. State, 508 S.W.2d 836 (Tex. Cr. App. 1974). The search was lawful; appellant's ground of error is overruled.

The appellant in his next ground of error asserts that the evidence is insufficient to corroborate the testimony of the accomplice witness, Sharon Bell. The jury was instructed that if an offense occurred, Bell was an accomplice as a matter of law.



Article 38.14, V.A.C.C.P., provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

In applying the statute to cases where the sufficiency of the evidence to corroborate the accomplice is challenged we eliminate from consideration the evidence of the accomplice witness and examine the other evidence to ascertain whether there is inculpatory evidence tending to connect the defendant with the commission of the offense. Moron v. State, 702 S.W.2d 624 (Tex. Cr. App. 1985); Cruz v. State, 690 S.W.2d 246 (Tex. Cr. App. 1985); Brown v. State, 672 S.W.2d 487 (Tex. Cr. App. 1984). Rice v. State, 587 S.W.2d 689 (Tex. Cr. App. 1979) (opinion on rehearing); Carrillo v. State, 591 S.W.2d 876 (Tex. Cr. App. 1979); Shannon v. State, 567 S.W.2d 510 (Tex. Cr. App. 1978); Edwards v. State, 427 S.W.2d 269 (Tex. Cr. App. 1968).

In the present case, Sharon Bell, the accomplice, testified that on the morning of March 12, 1979, she and the appellant drove to the Lone Star Ice and Food Store. The pair entered the store and Bell got a Coke. She asked the deceased about some teething medicine and Robitussin for babies. While they were inside, Bell noticed another customer. The customer told the deceased that if she needed anything he would be painting around the corner. The man left. Bell also noticed that another customer, a young Mexican-American male, came in and left.

After he left, the appellant and Bell approached the cash register where the deceased was standing. Bell asked for two or three packages of Kool cigarettes. The deceased placed them on the counter, whereupon the appellant pulled a pistol out, pointed it at the deceased,

and demanded that the deceased give him money. The deceased opened the cash register and placed the money in a paper sack. The deceased then volunteered that there was more money in the vault. The three went to the vault where the deceased opened the vault and placed the contents in the sack and handed it to Bell. Bell then headed for the door. When she left the vault area, the appellant was pointing the gun towards the deceased's temple. As she was leaving the store she heard the deceased ask the appellant not to shoot her. She then heard two or three gunshots. The pair got in the car and left. When she asked the appellant why he shot her, he stated he did not want to leave any witnesses.

Later that day, the appellant, with his brother and Bell, went to a car rental. The vehicle used in the offense was rented and they returned it and exchanged it for a Cougar. The appellant gave his brother cash from the robbery to rent the vehicle.

On the following day Bell, the appellant, and a companion went to Seguin. They returned to San Antonio to drop off the companion and then attempted to return to Seguin. Bell stated that on the return trip, they were stopped by a police officer and the pistol used in the robbery was found. Bell later told the police the pistol was hers and was subsequently convicted of unlawfully carrying a weapon. She testified that she told the police that the gun was hers so that both of them would not have to go to jail. At trial, Bell denied that the gun belonged to her.

Bell admitted that she had been convicted of the offense of murder with malice in 1974. She also stated that she was convicted for theft and was fined.

The non-accomplice evidence reveals that on the day of the offense, Aaron Archterberg went to the store before 9:00 a.m. He testified that he bought a seventy-nine cent sponge. It was later shown that the next to last purchase appearing on the cash register tape was for seventy-nine cents. He was painting about a block and



a half away from the store. He stated he saw a couple in the store and he identified the appellant as the male. He also stated that he had identified the female and was informed that her name was Sharon Bell. He also stated he remembered that Bell was purchasing or was about to purchase cigarettes which were in a green and white package.

Kenneth Rodriguez testified that he visited the store around 8:35 to 8:40 a.m. He saw the deceased and a couple inside the store. He identified the male as the appellant. He heard the female ask for Robitussin. The couple were still there after he left.

Josie Jeffries testified that she visited the store around 8:30 a.m. When she went in, she noticed that the cash register was open and empty. She also noticed keys and change on the floor. There was a package of Kool cigarettes on the counter. She and other persons who had entered the store then began to search the store; they found the deceased, shot, in the bathroom.

Juan Ramirez stated that he entered the store around 9:00 a.m. He stated that the deceased was not there and that after other people arrived, they looked for her. They subsequently found her and the police were called.

Various police officers stated that after they received a radio call they went to the Lone Star Ice and Food Store. The earliest any of them heard the radio call was 9:10 a.m. They found the deceased with close range bullet wounds in each of her temples. They also found the safe open.

Aric Howorth testified that on March 7 he rented an automobile to Joe Satterwhite. On the afternoon of March 12 Joe Satterwhite returned with his brother, the appellant, and exchanged the first car for a blue Cougar. He stated that the appellant picked out the automobile. He also stated that he was paid in cash.

Officer March Jackley testified that on March 13 he stopped a blue Cougar driven by the appellant. He found a pistol in the glove compartment of the vehicle.

Eva Castillo testified that on February 29, 1979, she sold a pistol to Lillie Merriweather. The pistol was the same type and contained the same serial number as the one found by Officer Jackley. Subsequent testimony revealed that the appellant's mother's name was Lillie Merriweather.

Two bullets were recovered from the deceased's body. A ballistics expert testified that the bullets were fired from the pistol seized by Officer Jackley.

The non-accomplice testimony is sufficient to corroborate Bell's testimony. The non-accomplice testimony places the appellant at the scene of the crime with the deceased the time she was last seen alive. See Ayala v. State, 511 S.W.2d (Tex. Cr. App. 1974), cert. denied 420 U.S. 930; *Edwards v. State*, supra. The appellant and the accomplice were found to be in possession of the murder weapon and their attempted journey from San Antonio to Seguin may be considered as flight. See *Edwards v. State*, supra. The evidenec presented is more than a mere showing that an offense occurred. It is not necessary that the non-accomplice evidence directly link the appellant to the crime or be sufficient for guilt. Rather, all that is required is that the non-accomplice evidence tend to connect appellant with the offense committed. The non-accomplice testimony was sufficient to corroborate Sharon Bell's testimony; the appellant's ground of error is overruled.

The appellant in his next two grounds of error asserts that the trial court erred when it denied appellant's requested jury instructions. The requested instructions would have instructed the jury that if they found that Sharon Bell shot the deceased in furtherance of a conspiracy with the appellant to commit aggravated robbery, they should find the appellant guilty of the offense of capital murder. However, if they found that the murder of the deceased by Sharon Bell was an act of her own volition and not in the furtherance of the conspiracy,



they should find him not guilty of capital murder.[1] The requested charges were in fact instructing the jury on the issue of whether the killing was on an independent impulse by Bell, and not in furtherance of a conspiracy

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[1] The requested instructions were as follows:

> Now, therefore, if you find from the evidence beyond a reasonable doubt that on the 12th day of March, 1979, in Bexar County, Texas, as alleged in the indictment that Sharon Rene Bell and the defendant, John T. Satterwhite had entered into and were attempting to carry out a conspiracy to commit the crime of aggravated robbery as those terms have been defined for you and that Sharon Rene Bell was then and there attempting to carry out said conspiracy between herself and the defendant, John T. Satterwhite, and you further find that Sharon Rene Bell did then and there with a gun, intentionally shoot and kill and thereby cause the death of Mary Frances Davis, and you further find that said offense of murder was so committed by Sharon Rene Bell in furtherance of the unlawful purpose of Sharon Rene Bell and the defendant, John T. Satterwhite, and was one that should have been anticipated as a result of carrying out of their conspiracy to commit the offense of aggravated robbery, then you will find the defendant guilty of the offense of capital murder. If you do not so find or if you have a reasonable doubt thereof, you will acquit him.
>
> You are further instructed that if you find the foregoing facts beyond a reasonable doubt from the evidence that the offense of murder was actually committed by the separate act of Sharon Rene Bell acting of her own separate volition, or you believe or have a reasonable doubt that such offense of murder on the part of Sharon Rene Bell was not in furtherance of the original unlawful purpose of Sharon Rene Bell and the defendant, John T. Satterwhite, or was not such an offense as should have been anticipated as a result of the carrying out of commission of the crime of aggravated robbery, then you will acquit the defendant, John T. Satterwhite, and say by your verdict not guilty of the crime of capital murder and then determine whether or note [sic] the defendant, is guilty of some other offense as herein defined to you.
>
> You are further instructed that if you find the foregoing facts (referring to the direct charge on parties to an offense who in the commission of one conspiracy commit another conspiracy) beyond a reasonable doubt except that you find from the evidence, or you have a reasonable doubt thereof, that in

to commit aggravated robbery. V.T.C.A. Penal Code, § 7.01(b) provides that:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

However, before such a charge is given, there must be evidence before the jury raising the issue.

In the present case there is no evidence that .Bell did the actual killing. Additionally, there is no evidence that a conspiracy existed between the appellant and Bell. A charge on a defensive theory is only required when the evidence raises that issue. Lopez v. State, 574 S.W.2d 563 (Tex. Cr. App. 1978). Furthermore, the evidence presented at trial of the appellant's conduct alone was sufficient to sustain the conviction; no charge on independent impulse was necessary. Bowers v. State, 570 S.W.2d 929 (Tex. Cr. App. 1978); McGuin v. State, 505 S.W.2d 827 (Tex. Cr. App. 1974). The trial court did not err in refusing appellant's requested jury instruction; the grounds of error are overruled.

The appellant also contends that the trial court erred in instructing the jury on the law of parties. The trial

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killing MARY FRANCES DAVIS said SHARON RENE BELL was acting outside of the common plan and design of SHARON RENE BELL and JOHN T. SATTERWHITE or that said killing was not in the furtherance of the common purpose and design of both SHARON RENE BELL and JOHN T. SATTERWHITE and that JOHN T. SATTERWHITE had no knowledge of the intent of SHARON RENE BELL or that said killing was not one that should have been anticipated by the said JOHN T. SATTERWHITE then you will find the defendant not guilty of capital murder, and then proceed to determine if the Defendant is guilty of some lesser included offense.

(End of footnote)



court, over appellant's objection, gave an abstract instruction on the law of parties defining criminal responsibility according to V.T.C.A. Penal Code, § 7.02(a)(2).[2] The trial court then applied the law to the facts in the instruction. The appellant claims that there was no evidence presented which raised that issue and that the trial court improperly included the instruction resulting in harm to the appellant.

However a review of the record reveals that the appellant in his Requested Instruction No. 10 requested that the following instruction be given:

> Before you are warranted in convicting the defendant of capital murder, you must find beyond a reasonable doubt that on March 12, 1979, that the defendant, John T. Satterwhite, either alone, or as a party to the offense, or in the furtherance of a conspiracy to commit a felony offense, as those terms have been above defined to you, was engaged in the commission of the felony offense of robbery, and also during the commission of the robbery, the defendant, John T. Satterwhite, either alone, as a party to the offense, or in the furtherance of a conspiracy to commit a felony offense, intentionally shot the deceased, with the intention of thereby killing her.
>
> Therefore, unless you find from the evidence beyond a reasonable doubt that the defendant, on the occasion in question, either alone, or as a party to the offense of robbery, or in the furtheranec of a conspiracy to commit the offense of robbery, specifically intended to kill the said deceased, Mary Frances

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[2] Sec. 7.02(a)(2) provides as follows:

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> * * *
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense, . . .

Davis, when he shot her, if he did, you cannot convict him of the offense of capital murder. If you have a reasonable doubt, you must find the defendant not guilty of the crime of capital murder.

You are, therefore, instructed that if you find and believe from the evidence beyond a reasonable doubt that the defendant, John T. Satterwhite, in the County of Bexar, State of Texas, on or about the 12th day of March, 1979, committed or attempted to commit the offense of robbery and that in the course of and in furtherance of or in immediate flight from the commission or attempt to commit the offense of robbery, if any, the defendant, John T. Satterwhite, did or attempted to participate in the offense of robbery knowing that one of the participants to the robbery was in possession of a gun, and that this act was clearly dangerous to human life, if it was, and did thereby cause the death of Mary Frances Davis, if it did, then you will find the defendant guilty of murder, but if you do not so find, or if you have a reasonable doubt thereof, you will find the defendant not guilty of murder and next proceed to determine if he is guilty of any lesser offense.

The instruction requested by the appellant was essentially the same as the instruction subsequently given by the trial court. We also note that appellant's Requested Instruction No. 1 and No. 11, discussed previously, also dealt with the law concerning criminal responsibility. Two additional instructions requested by the appellant involved the law of parties.[3] We therefore conclude that

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[3] The appellant's Requested Instruction No. 2 requested the following instruction be given:

> You are further instructed that if you find from the evidence, or have a reasonable doubt, based from the evidence that the offense of murder was actually committed by the separate act of the defendant, John T. Satterwhite acting of his own separate volition, and you believe, or have a reasonable doubt, that



error, if any, in instructing the jury on the law of parties was waived by appellant's requested instructions. Appellant cannot be heard to complain about instructions given by the trial court where it is essentially the same charge as was requested by appellant. This ground of error is without merit.

Additionally, we note that as the evidence of appellant's conduct alone was sufficient to sustain the conviction, no charge on parties was required. Todd v. State, 601 S.W.2d 718 (Tex.Cr.App. 1980). The charge made appellant's guilt contingent on a finding that he committed the offense either acting alone or as a party. Because the jury was authorized to convict appellant if it found he was acting alone, any error was harmless. *Todd v. State*, supra. The ground of error is overruled.

Appellant in his next ground of error argues that the trial court erred in admitting into evidence the testimony of a psychiatrist, Dr. Grigson, during the punishment phase of the trial. Appellant maintains that the testimony was obtained in violation of his rights as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Appellant relies upon the recent decision of the United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct.

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> such offense of murder on the part of the other defendant, Sharon Rene Bell, was not in furtherance of the original unlawful purpose of both the Defendants and was not such an offense as should have been anticipated as a result of the carrying out of the offense of robbery, if any, then you will find the defendant John T. Satterwhite, not guilty of the offense of capital murder and then next proceed to determine from the evidence whether or not the defendant, John T. Satterwhite, is guilty of any lesser included offense.

His Requested Instruction No. 7 requested the following instruction be given:

> Mere presence at the scene of a crime does not constitute conduct sufficient, standing by itself, to make a person criminally responsible as a part to an offense for the conduct of another.

1866, 68 L.Ed.2d 359 (1981), in which Dr. Grigson once again testified during the punishment phase of a capital murder trial. Dr. Grigson was the only witness the State presented during the punishment phase, in which he stated that the appellant was a sociopath and a continuing threat to society. See Art. 37.071, V.A.C.C.P. Dr. Grigson's testimony was based upon an examination of Smith while he was in custody. The Supreme Court held that Dr. Grigson's testimony was inadmissible because prior to the doctor's examination, the appellant was not informed that any statement he made could be used against him and that he had the right to remain silent. Thus, the statements made to the psychiatrist were not freely and voluntarily given and were therefore obtained in violation of his privilege against self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court also held that Smith's Sixth Amendment right to assistance of counsel had been violated. The examination in question took place after the appellant had been indicted, meaning that his right to assistance of counsel had attached. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The Court stated that defense counsel was not given advance notice that the examination would encompass the issue of their client's future dangerousness, and that Smith "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's finding could be employed." Smith did not waive counsel, therefore the admission of Dr. Grigson's testimony violated his Sixth Amendment right to assistance of counsel.

In the present case appellant similarly argues that both his Fifth Amendment and Sixth Amendment rights were violated by the admission of Dr. Grigson's testimony. Before we address the Fifth Amendment issue we conclude that appellant's Sixth Amendment right to assistance of counsel was violated.



The offense in question occurred on March 12, 1979, and appellant was arrested on March 13. On March 15 or 16 appellant was charged with capital murder.[4] Dr. Grigson testified that on March 19, pursuant to a court order, he attempted to examine appellant. He was unable to conduct the examination at that time but did examine the accused on May 3. The record does not contain a court order instructing Dr. Grigson to examine appellant. As in *Estelle v. Smith*, appellant had already been indicted when this examination took place. Thus, his right to assistance of counsel had attached. *Kirby v. Illinois*, supra. While the attachment of that right does not mean that appellant had a constitutional right to have counsel actually present during the examination, *Estelle v. Smith*, supra, it does mean that appellant's attorneys should have been informed that an examination, which would encompass the issues of future dangerousness, was to take place. Additionally, the attachment of this right meant that appellant could have consulted with his attorney prior to the examination. There is nothing to indicate that appellant gave a knowing, intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record. We, therefore, conclude that Dr. Grigson's testimony was improperly admitted into evidence in violation of appellant's Sixth Amendment right to assistance of counsel.

While we conclude that this admission was error we further hold that in light of other evidence presented, its admission did not constitute reversible error. Unlike in *Estelle v. Smith*, Dr. Grigson's testimony was not the only evidence offered by the State during the punishment phase of the trial.

Here, eight peace officers testified that appellant's reputation for being a peaceful and law abiding citizen was bad. One of the officers stated that he had a confronta-

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[4] Appellant was indicted on April 4 and counsel was appointed on April 10.

tion with appellant. He said that after receiving a complaint about appellant, he attempted to question him. As he approached appellant, appellant reached inside his waistband. The officer grabbed his hand and found a loaded pistol inside appellant's waistband.

Lee Roy Merriweather testified that he used to be married to appellant's mother. He stated that less than a year before the present offense, he had an argument with appellant. Merriweather locked appellant out of their home and he responded by shooting at Merriweather through the door. The witness was hit twice and was hospitalized for a month.

The evidence presented also showed that appellant had been convicted of aggravated assault, burglary with intent to commit theft, theft under fifty dollars, and robbery by assault with firearms.

Additionally, Dr. Betty Lou Schroeder, a psychologist, testified as to appellant's future dangerousness. *Appellant did not object to Dr. Schroeder's testimony at trial and does not complain of its admission on appeal.* We note that prior to examining appellant, Dr. Schroeder informed him of his rights as outlined in *Miranda v. Arizona*, supra. Additionally, the doctor obtained a release from appellant so as to allow her to release the information she obtained from the interview.

Dr. Schroeder's testimony was very similar to Dr. Grigson's concerning their conclusions about appellant. Both stated that appellant was a cunning individual, very evasive and very guarded. She added that appellant was a user of people, had an antisocial personality and an inability to feel empathy, and would be a continuing threat to society through his acts of criminal violence.

The jury also had the evidence adduced at the guilt stage of the trial for its consideration in answering the special issues at the punishment phase. Brown v. State, 627 S.W.2d 152 (Tex.Cr.App. 1983); O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr.App. 1979) The evidence at the guilt stage was undisputed that appellant committed a



brutal and senseless murder during the course of a robbery. Even though he had obtained the money from the cash register and safe, he shot the deceased two or three times in the head at close range so that there would be no witnesses. The facts of this crime show that appellant's conduct was calculated and remorseless. Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976).

We conclude that the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" even if Dr. Grigson's testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt. Sanne v. State, 609 S.W.2d 762 (Tex.Cr.App. 1980). The appellant's Sixth Amendment ground is overruled.[5]

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[5] The Court recognizes the holding in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), in which the United States Supreme Court stated that, "this Court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' Chapman v. California, [386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]". While applicable at first glance, the holding in *Holloway* is distinguishable from the case at bar.

In *Holloway*, the Sixth Amendment violation arose through one attorney's joint representation of co-defendants with arguable conflicting interests. The conviction was reversed on the basis that once the existence of a possible conflict is presented to the judge, failure to thereafter appoint separate counsel for each co-defendant violated the Sixth Amendment. It was in this limited context that the Court concluded that a violation of one's constitutional right to counsel can never be harmless error; a context in which the violation was so fundamentally unfair, it irrevocably tainted the *entire* proceeding.

The error in the present case, while just as improper, related only to the admission of Dr. Grigson's testimony, rather than to the proceeding as a whole.

We feel certain that the evidentiary nature of this error, rendered harmless by the facts of the crime for which he was on trial, his bad reputation, his use of firearms in the past, his four prior con-

As to his Fifth Amendment claim, appellant maintains that Dr. Grigson failed to properly inform him of rights under *Miranda*, supra, prior to the examination. In *Smith*, the Court held that prior to psychiatric interrogation an accused is entitled to be informed of his rights as outlined in *Miranda*, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." *Miranda*, 467-469, 86 S.Ct., at 1624-1625.

Unlike his examination in *Estelle v. Smith*, in the present case Dr. Grigson testified that prior to any questioning he explained to appellant that the purpose of the interview was to determine appellant's competency to stand trial, his sanity at the time of the offense, and whether he presented a continuing threat to society. Dr. Grigson then admonished appellant that he had the "option to remain silent or to simply refuse the examination and no psychiatric examination would take place." The doctor also told him that the results of the examination "could be harmful or it could be helpful depending upon what the findings would be." Subsequent to these warnings appellant consented to the examination: Dr. Grigson thereafter concluded that appellant would "present a continuing threat to society by continuing acts of violence."

We find the warnings given to appellant sufficient under the holdings of *Estelle v. Smith* and *Miranda*. No error is presented and appellant's Fifth Amendment claim is overruled.

Appellant in his final ground of error contends that his conviction was obtained in violation of the Speedy Trial Act, Art. 32A.02, V.A.C.C.P. A hearing on appel-

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victions and the uncontested testimony of Dr. Schroeder, was a form of Sixth Amendment violation not contemplated by the Court in *Holloway*. "We decline to follow what one judicial scholar has termed 'the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.' " *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).



lant's motion to set aside the indictment for failure to comply with the Speedy Trial Act was held on August 27, 1979. The State announced ready and the trial court overruled appellant's motion.

The record reflects that appellant was arrested and charged on either March 15 or March 16, 1979. On April 9 counsel was appointed for appellant and on April 13 he was arraigned. At the arraignment, the State filed a written announcement of ready, a pre-trial hearing was set for May 17, and the trial was set for May 29. On May 29, a hearing was held and several of appellant's pre-trial motions were ruled upon. At the May 29 hearing, one of the district attorneys stated that he was not completely familiar with the files and anticipated that the case would not be tried that week. The trial court stated that he had the same anticipation and it was later revealed that another capital murder case was set for the next week.

At the hearing on August 27 on appellant's motion to set aside the indictment, two members of the district attorney's office testified. Roy Barrera, Jr. stated he subscribed the announcement of ready that was filed on April 13. He testified that he had prepared for the trial prior to April 13 but that the subpoenas had not been sent. However, he had compiled a witness list with their names, addresses and phone numbers so that they could be contacted when needed. He was unsure if all the witnesses had been contacted or whether the psychiatric expert was ready to testify. Barrera, however, testified that he was familiar with the case and the facts and was ready to go to trial if necessary. He added that he was ready to go to trial without the subpoenas being issued and without psychiatric testimony if necessary. He concluded that he had no doubt that the State could have begun jury selection on that date.

Bill Harris, also of the district attorney's office, testified that he had stated he was not familiar with the file in this case in the middle of May.

Appellant contends that this evidence is sufficient to establish that the State was not ready for trial within the time limits required by Art. 32A.02, supra. We do not agree.

An announcement of ready by the State is a prima facie showing of compliance with the Speedy Trial Act. Fraire v. State, 588 S.W.2d 789 (Tex.Cr.App. 1979); Barfield v. State, 586 S.W.2d 538 (Tex.Cr.App. 1979). However, the defendant may rebut such a showing by presenting evidence that demonstrates that the State was not ready for trial during the time limits of the Speedy Trial Act. *Barfield v. State*, supra. Here, the evidence is insufficient to rebut the State's assertion of readiness; nothing in the record indicates that the State could not have proceeded to trial during the required time limits. Calloway v. State, 594 S.W.2d 440 (Tex.Cr.App. 1980); Compare Pate v. State, 592 S.W.2d 620 (Tex.Cr.App. 1980). Appellant's ground of error is overruled.

We have also considered the grounds of error raised in appellant's untimely filed pro se brief. We find these contentions without merit.

The judgment is affirmed.

W. C. DAVIS, Judge

Delivered September 17, 1986

En Banc

Publish

White, J. Not Participating



## DISSENTING OPINION

For good and sufficient constitutional reasons Article 37.071, § (h), V.A.C.C.P., mandates this Court to review every judgment of conviction for capital murder in which punishment imposed is death. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In a word the objective of our review in any given cause is to assure that a decision to inflict the penalty of death upon the person convicted is free of "arbitrariness." *Gregg v. Georgia*, supra, U.S. at 204-206, S.Ct. at 2939-2940; or in two, that it "will not be 'wantonly' or 'freakishly' imposed." *Jurek v. Texas*, supra, U.S. at 276, S.Ct. at 2958. That is not to say those terms constitute standards or tests by which to assay particular grounds of error, just that they more or less contribute to an understanding of what to guard against in coming to an ultimate conclusion that the State has shown itself entitled to put a citizen to death.

Aside from specific grounds of errors, to me there is an aspect of this cause that is most troublesome: that at punishment testimony of an "expert" in such matters is presented to the jury in violation of appellant's constitutional right to assistance of counsel. My concerns go the heart of the verdict of the jury, the first on guilt and then both on punishment.

The ubiquitous James P. Grigson, M.D., testified in his own inimitable fashion, now well known to every experienced practitioner in capital cases. To find that "in light of other evidence presented," admitting his expert opinion on what is literally a matter of life or death does not amount to reversible error is startling.

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), addressed comments on failure of an accused to testify. However, it drew the basic rule from Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 705 (1963), *viz*:

> "There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' *Id.*, at 86-87, [84 S.Ct. at ——,] 11 L.Ed.2d at 173."

Developing that proposition, the *Chapman* Court squarely concluded:

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless."

*Id.*, at 23-24, 87 S.Ct. at ——, 17 L.Ed.2d at 710.

When the issue is punishment, this Court has similarly followed the *Fahy* test confirmed by *Chapman*. Clemons v. State, 605 S.W.2d 567 (Tex. Cr. App. 1980); also see Jordan v. State, 576 S.W.2d 825, 830 (Tex. Cr. App. 1978). Finding we could not say that evidence erroneously admitted was harmless beyond a reasonable doubt "given the number of years assessed by the jury," we buttressed that conclusion "by the prosecutor's request to the jury to consider this inadmissible evidence in assessing punishment, . . . as well as what seems to us to have been the probable impact of the erroneously admitted evidence on the minds of an average jury during the punishment phase of the trial." *Id.*, at 571-572.

Here too, the jury's answer to special issue two patently is based in part at least on testimony of Dr. Grigson, bolstered by argument of the prosecutor reminding jurors that Dr. Grigson is a "Dallas psychiatrist and medical doctor [as compared to as mere psychologist employed by Bexar County]," and then recounting that "Dr. Grigson . . . tells you that on a range from 1 to 10 [appellant is] a ten plus," following that with an iteration of terms Dr. Grigson can explicate so expertly to jurors. Indeed, as in *Clemons*, supra, one may reasonably believe the State's case during the punishment hearing "could have been 'significantly less persuasive' had the evidence been excluded." *Ibid.*



Finally, a few words about voir dire of the lady who exclaimed, "*You are telling me that in other words you don't have to defend yourself.*"[1] It is obvious that she did not ever recede from her spontaneously revealed bias (or prejudice depending on where one is coming from). When defense counsel asked her directly if she had "a bias against the law that says that the Defendant does not have to defend himself," she confessed, "I guess maybe I do," adding, "I haven't thought about that." Then came appellant's challenge for cause.

The prosecutor took over and after he broached the specific subject of the Fifth Amendment privilege in a lengthy discourse followed by a question, Coderman answered, "Yes." However, when the trial court asked for her answer, she responded, "Yes. *I don't quite understand what he is saying.*" So the judge tried to explain burden of proof, ending with "and you must reach your verdict based on the evidence that is offered, *not the evidence that is not offered.*" Coderman stated, "*I think I can make a decision.*" Over protest of counsel for appellant, the judge overruled his challenge.

Apparently following questions more than reactions to them, the majority opines that her statement to the court that she did not quite understand what the prosecutor was talking about, and her unresponsive enigmatic thought that she could "make a decision" "indicate that the juror was capable of following an instruction that she would not consider appellant's failure to testify or present evidence as any evidence against him." Yet, should we do that which the majority says it must do—examine her voir dire in its entirety—we would have to find that the venireperson herself volunteered, in effect, that she believed the law personally abhorrent that an accused need not defend himself, and she failed to articulate any change in that bias by merely saying she did not understand what the prosecutor was saying and by telling the judge she thought she could "make a decision."

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[1] All emphasis supplied.

I would conclude the trial court erred in overruling a challenge for "bias or prejudice exists on the basic theory of law," which Coverman revealed, then admitted and never recanted.

For those reasons and also disagreeing with treatment of certain other grounds of error,[2] I respectfully dissent.

CLINTON, Judge

(Delivered September 17, 1986)
EN BANC
PUBLISH

[2] For one instance, while the majority may reach the correct result in approving overruling appellant's motion to suppress, its reasoning in some particulars is faulty. It is not enough that a peace officer is "authorized" by law to arrest any person found committing traffic offenses. A search or seizure issue will turn on what he actually did in the premises. Unless he makes a lawful custodial arrest, *Belton v. New York* (see majority opinion, at 7), is not applicable, and there can be no search or seizure incident thereto. Linnett v. State, 672 S.W.2d 672 (Tex.Cr.App. 1983).



DISSENTING OPINION

For those readers unfamiliar with the location of the City of Live Oak, Texas, the official highway travel map of Texas that I have reflects that it is contiguous to the City of San Antonio, and its boundaries lie on both sides of Interstate 35 (east). The well known City of Selma, see December, 1974 and November, 1976 editions of *Texas Monthly*, is located contiguously to the east of Live Oak.

The record reflects that on March 13, 1979, at 10:17 o'clock p.m., Live Oak Police Officer Mark Jackley was "working radar" on Interstate 35, presumably being on the lookout for "speeders" who might then be driving in excess of the posted speed limit of 55 miles per hour. Given the territory and the terrain, Jackley did not have to wait long to catch a speeder. Jackley clocked the speed of the vehicle that was shown to be driven by the appellant at 82 miles per hour.

Art. 6701d, § 166 (a), V.A.C.S., provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential circumstances, then existing. However, driving a motor vehicle at a rate of speed in excess of the posted speed limit shall be prima facie evidence that the speed is not reasonable or prudent and is thus unlawful.

Section 148 of the statute, however, provides that the offense of speeding shall be the only offense in our traffic laws making mandatory the issuance of a written notice to appear in court; thus, the police may not, for this offense, take into custody the accused if he gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer. Two exceptions, which are not applicable to our facts, are if the speeding vehicle is licensed in a state or country other than Texas or if the speeding vehicle is being driven by a resident of a state or country other than Texas.

Based upon the radar reading, Jackley then pursued the vehicle later shown to be driven by the appellant in order to stop it and presumably to give appellant a speeding ticket, with him then being permitted to proceed on his way.

The appellant, however, did not stop his vehicle and, for reasons not reflected in this record, cut over into the grassy median area separating the north and south lanes of Interstate 35 where he then stopped his vehicle. Between the time when Jackley put on his warning lights, as well as when he was using his spotlight, until the appellant stopped his vehicle, there was much movement inside of the appellant's vehicle, which was then occupied by the appellant and a female passenger, by both the appellant and his passenger. The appellant then got out of the vehicle he was driving and walked to the rear of his car. Jackley's vehicle was then parked behind the appellant's vehicle. After Jackley approached the appellant's vehicle, he ordered the female passenger to remove herself from the car, which she did. Jackley then "patted down" both appellant and his female passenger "for weapons." No weapons were found. When asked for a driver's license, the appellant produced a temporary driver's license in the name of "Bobby Ted Satterwhite." The driver's license apparently did not arouse any suspicion on the part of Jackley. During this time, the female passenger started moving toward the driver's side of the door, but, after first disputing Jackley's command to stop, she then complied with his order to return to the rear of the vehicle which she had been riding in. The appellant also commenced getting closer to Jackley, but, upon command, he backed off.

Given the above facts and circumstances, it would appear that a reasonable, prudent police officer would have, when he got the appellant's vehicle stopped, if not before, called for a police back-up unit, or radioed for possible assistance to other law enforcement agencies, such as the



Department of Public Safety, which also patrols this location. However, Jackley did no such thing.

Jackley, instead, notwithstanding the previous suspicious movements of the appellant and his passenger, decided to then search the interior of the vehicle that the appellant had been driving. While Jackley was looking under the car seats, "for weapons," both the appellant and his passenger started moving closer toward him and Jackley twice had to order them to back off to the rear of the car, which they did. Jackley, undaunted by the strange actions of the appellant and his passenger, continued searching the inside of the car. He eventually got to the glove compartment and after opening same, presumably with his back to the appellant and his passenger, found therein a pistol, which was later shown to be the murder weapon.

The appellant moved in the trial court to suppress the pistol as evidence, but the trial court overruled the motion.

Given the facts and circumstances of this case, as far as the initial stop, and as far as Jackley was concerned, there was only one violation committed, and that was the offense of speeding.

The majority opinion implicitly, but erroneously, holds that Jackley's stopping the appellant's vehicle for speeding then gave him the right to conduct a complete warrantless search of the vehicle, as an incident to the lawful arrest. Such holding flies in the face of our statutory law. As previously pointed out, if a police officer stops a citizen motorist of this State for speeding and the citizen has a valid Texas driver's license and is driving a vehicle with Texas plates thereon, without more, the arresting officer is not permitted to do anything more legally than to issue a traffic citation and send the driver on his way. The majority opinion also holds that because the appellant failed to stop, Jackley had the right to make a custodial arrest of the appellant for violating the provisions of Art. 6701d, § 186 and 75, V.A.C.S., fleeing

or attempting to elude a police officer and, get this, failure to yield to an emergency vehicle, Jackley's.

Given the facts and circumstances that went to the issue, I find that this kind of legal thinking and reasoning is preposterous and outlandish. Given a cursory reading of the cases cited by the majority opinion to support its position, they will simply not support its holdings.

The majority opinion does not end its ridiculous legal thinking and reasoning at this point; it plods forward and erroneously holds that Jackley had reasonable grounds to believe that he was in danger of bodily injury, thus giving him the right to conduct a complete search of the interior of the motor vehicle, "solely for his own protection." The majority opinion concludes: "[T]he officer was justified in believing he was in danger." Given the facts and circumstances of what occurred after Jackley stopped the appellant's vehicle, this conclusion is totally erroneous. How any rational human being can conclude under the facts that Jackley had a "fear" that his life might have then been in danger is simply beyond my comprehension. The mere expression of a conclusion by a police officer that he was in fear should never be sufficient to authorize a warrantless arrest or a warrantless search of a person or his motor vehicle. Cf. *Frazer v. State*, 508 S.W.2d 362 (Tex. Cr. App. 1974).

Clearly, Jackley's warrantless search of the glove compartment and the warrantless seizure of the pistol therefrom were unlawful under the Constitution and statutory laws of this State. To the majority opinion's contrary holding, I respectfully dissent.

TEAGUE, Judge

Miller, J., joins.

EN BANC

DELIVERED: September 17, 1986

PUBLISH



Trial Court No. 79-CR-853-B

THE STATE OF TEXAS.

TO THE 175TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY—GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 3rd day of December A.D. 1986 the cause upon said appeal to revise or reverse your Judgment between

No. 67,220

JOHN T. SATTERWHITE
*Appellant*

vs.

THE STATE OF TEXAS,
*Appellee*

was determined: and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

The Motion for Leave to File Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL AP-

PEALS, with the Seal thereof annexed, at the City of Austin, this 19th day of December A.D. 1986.

Thomas Lowe
Clerk

/s/ Belva Myler
Deputy Clerk



SUPREME COURT OF THE UNITED STATES

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No. 86-6284

JOHN T. SATTERWHITE,
*Petitioner*

v.

TEXAS

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 1, 1987

# PETITIONER'S

# BRIEF

No. 86-6284

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. SATTERWHITE

*Petitioner,*

v.

THE STATE OF TEXAS

*Respondent.*

**On Writ Of Certiorari To The Texas Court Of Criminal Appeals**

## PETITIONER'S BRIEF

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## QUESTION PRESENTED

Petitioner was denied effective assistance of counsel, a fair and impartial trial, equal protection of law, due process of law and his right to be free from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial court allowed witness, James Grigson, M.D., to testify to evidence obtained in violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

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## TABLE OF AUTHORITIES

## OPINIONS BELOW

The opinion of the Court of Criminal Appeals is reported as *John T. Satterwhite* v. *The State of Texas*, 726 S.W. 2d 81, (Tex. Cr. App. 1986).

## JURISDICTION

The judgment sought to be reviewed is that of the Court of Criminal Appeals in *John T. Satterwhite* v. *The State of Texas*, 726 S.W. 2d 81, (Tex. Cr. App. 1986). On December 3, 1986 the Court of Criminal Appeals of Texas by written opinion affirmed Petitioner's conviction and denied motion for rehearing without opinion. On January 30, 1987, a petition for writ of certiorari was filed asking for a stay of execution which was granted pending review. The writ of certiorari was granted on June 1, 1987 to review the final judgment of the Texas Court of Criminal Apppeals limited to the first question presented.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

### PROCEEDINGS IN THE TRIAL COURT

On March 12, 1979, Mary Davis, a clerk in a convenience store in San Antonio, Texas, was murdered by gunshot wounds during the course of a robbery.

JOHN T. SATTERWHITE was arrested and charged with Capital Murder on March 15, 1979. (J.A.-6) The next day, on March 16, 1979, the Criminal District Attorney of Bexar County, Texas, filed with the Presiding District Judge a Motion for Psychological Examination with no notice to the Petitioner nor any other individual, which Motion was granted as reflected by the Court's Order.

(J.A.-5) Thereafter, on April 10, 1979, the Court appointed Counsel for the Petitioner and notified Counsel of the arraignment date set for April 13, 1979. (J.A.-7,8,9,10) Subsequently and at a time when the District Attorney knew that the Petitioner had appointed Counsel, a Motion for Psychiatric Examination was filed with the Court with, again, no notice or Certificate of Service tendered to Counsel which Motion was granted by the Honorable Preston H. Dial, Jr., Judge Presiding, on April 18, 1979. (J.A.-12,13,14)

On May 29, 1979, Counsel filed several pretrial motions including but not limited to a Motion to Suppress the testimony of any and all psychiatrists, psychologists, or neurologists who had been appointed or who had examined the Petitioner since the time of his arrest. (J.A.-21,22,23) Inclusive of such pretrial motions was a Motion in Limine to restrict any statements made by the Petitioner while under arrest that do not conform to the requirements of Article 38.22, Texas Code of Criminal Procedure, on August 24, 1979. (J.A.-28,29)

At Petitioner's pretrial hearing, the Court granted relief in the respect of allowing for a hearing to be held outside the presence of the jury. (J.A.-44,45)

Subsequent to the Petitioner's conviction of Capital Murder by a jury, and during the punishment phase of his trial, one punishment witness called by the State, Dr. Betty Lou Schroeder, testified to the jury about her findings based upon her interview and testing of the Petitioner. As a predicate to such interview, Dr. Schroeder testified that she gave "Miranda warnings" to the Petitioner among which she was asked if she had given a caveat that he had a right to have an attorney present during the interview. Although Dr. Schroeder states that



they discussed such issues she does not say that he waived his right to have counsel present. (J.A.-47) The Court, based upon the complaints made by Counsel during pretrial motions and hearings, ordered that the witness may testify but she was not to relate anything that Petitioner might have told her. (J.A.-48) Despite such admonition, the witness did in fact testify and commented on things that she was informed by the Petitioner which, despite objections by Counsel as being in violation of the Court Order, the Court sustained such objection but would not grant any additional relief with regard to mistrial. (J.A.-55) Dr. Schroeder was further asked by the Prosecutor based upon her interview and other expertise qualifications, what opinion she had as to the future dangerousness of the Petitioner to which she stated that he did. (J.A.-56)

The State's final witness on the punishment phase was Dr. James Grigson who interviewed the Petitioner subsequent to appointment of Counsel without Counsel's knowledge. Dr. Grigson further testified that he also had "warned" the Petitioner and stated further that whatever Petitioner told him could be harmful to him or it could be helpful. (J.A.-60,61) The Court, again despite objections of Counsel, allowed the witness to testify but not to relate to the jury anything that may have been spoken to him. (J.A.-61) Again, during Dr. Grigson's testimony, he was asked the threshold question of future dangerousness to which his opinion was that the Petitioner would be in addition to a comparison on a scale from one to ten that he would be a "ten plus." (J.A.-73)

At the close of the evidence, the jury deliberated and answered the special issues pursuant to Section 37.071 of the Texas Code of Criminal Procedure and Petitioner was

sentenced to death pursuant to Section 19.03 of the Texas Penal Code.

## APPELLATE PROCEEDINGS

Petitioner's conviction was affirmed by the Court of Criminal Appeals of Texas on September 17, 1986, with rehearing denied on December 3, 1986.

## SUMMARY OF ARGUMENT

The Petitioner's Fifth, Sixth and Fourteenth Amendments rights under *Estelle* v. *Smith*, 451 U.S. 454 (1981), were violated when Doctors Betty Lou Schroeder and James Grigson testified for the prosecution at the penalty phase on the basis of a pretrial interview arranged by the prosecution but conducted without first advising Counsel and advising Petitioner that he had a right to remain silent and to obtain an affirmative understanding of his right to Counsel; that he anything he said might be used against him at the penalty phase of a capital trial be for submitting to the interviews.

The Texas Court of Criminal Appeals further erred in determining the *Smith* error may be deemed harmless as this Court in *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978) and *Chapman* v. *California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed. 2d 705 (1967) and other Circuit Courts and the Texas Court of Criminal Appeals have explicitly rejected such claims in prior cases in applying the standard of "beyond a reasonable doubt."

## ARGUMENT AND AUTHORITIES

Despite the Texas Court's majority opinion, Petitioner moved to exclude all testimony of such witnesses on issue of expert testimony as it relates to future conduct. Dur-



ing the testimony of DR. SCHROEDER and DR. GRIGSON, objections were made as the same relates to both expert witnesses which motions was overruled by the trial Court.

As the dissenting opinion filed by Judge Clinton reflects, Dr. James P. Grigson, is well known to every practitioner in capital cases. It is this very same "expert witness" that has testified in several punishment phases of criminal proceedings in capital cases which has been noted in *Estelle* v. *Smith*, 451 U.S. 454, 101 S.Ct. 866, 68 L.Ed. 2d 359 (1981). The majority opinion, in review of the evidence, did conclude that the psychiatrist's opinion was improperly admitted however, that such was harmless error. In the Court of Criminal Appeals majority's reasoning justifying such conclusion, it states that a psychologist employed by the County is not subject to the same scrutiny as a psychiatrist hired from outside the municipal boundary of the City of San Antonio. The majority opinion rationalizes that unlike *Estelle* v. *Smith*, supra, other evidence was admitted during the punishment phase of Petitioner's trial. One "rationalized syllogism" is that the Petitioner did not object to Dr. Schroeder's testimony who essentially testified to the Petitioner's future dangerousness. Contrary to such language, Counsel on numerous occasions objected to the witnesses' testimony (J.A.-55)—especially as to the witnesses' violation of the Court's Order of restricted access to the Petitioner. When inquired of why she disobeyed such an Order, Dr. Schroeder testified that although she assumed an attorney was appointed to represent the Petitioner, she did not attempt to talk to any attorneys regarding her examination. (J.A.-57). Despite her knowledge that the Petitioner had counsel, she undertook to elicit evidentiary information from the Petitioner. The Texas Court of

Criminal Appeals has seen fit to render the same harmless error beyond a reasonable doubt.

While the Texas Court of Criminal Appeals states that the testimony of Dr. Schroeder is "uncontested," it appears complete disregard is made of the complaints heard in the pretrial Motion to Suppress and Motion in Limine in addition to the very basis for which such an "expert" can formulate an opinion as to the future dangerousness of an individual.

This Court in *Holloway* v. *Arkansas*, 435, U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978), stated that reversal is automatic when a Defendant is deprived of assistance of counsel (a critical stage in, at least the prosecution of a capital offense). See *McKeldin* v. *Rhodes*, 631 Fed. 2d 458 (6th Cir., 1980). In a further in-depth review of the majority opinion, this Court in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), stated that before considering harmless error, the Court must be satisfied beyond a reasonable doubt, that the error did not contribute to the defendant's conviction and/or punishment meted. Also if, in the course of the prosecution in the trial, continuous and repeated references to such error is made, and inferences drawn therefrom, such error cannot constitute harmless error.

In the instant case, it is readily apparent that Dr. Grigson's testimony was quite significant.

Unlike the factual situation which occurred in *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed. 2d 434, 106 S.Ct. ___, [85-5487], the *Smith* decision dealing with Dr. Grigson's testimony was "the Law of the Land" to which direct reference was made in the state court appeal. Inclusive in such complaint is the testimony of Dr. Schroeder as the issue bares to denial of right to counsel from the inception



of the adversary proceedings which occurred on March 15, 1979. In view of the absence of specific accusatory recognition of Dr. Schroeder's testimony in the state appeal coupled with the *Smith* decision at hand, such cannot be considered a "deliberate tactical decision." Admission of *any expert testimony* the basis of which was made without benefit of the accused's counsel will result in a fundamental miscarriage of justice by the violation of the accused's Sixth Amendment rights.

The cases cited herein are concerned not with the ineffective assistance of counsel, but rather, in various settings, with a denial of counsel altogether. The Petitioner, has his right inherently and/or otherwise, to be heard and represented by counsel.

This Court, in *Herring* v. *New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed. 2d 593 (1975), and in *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978), stated, citing other authorities, that complete denial of counsel to a Defendant could *never* give rise to harmless error. See *Chapman* v. *California*, 386 U.S. 18, 23, N. 8, 87 S.Ct. 824, 827, 17 L.Ed. 2d 705 (1967)—especially to the extent of the "beyond a reasonable doubt" standard.

The Sixth Amendment guarantee to effective assistance of counsel is so fundamental that its deprivation will *mandate* reversal of a conviction even absent a showing that the resulting prejudice affected the outcome of the case. See *Glasser* v. *United States*, 315 U.S. 60, 76, 62, S.Ct. 457, 467, 86 L.Ed. 680 (1941). *United States* v. *King*, 664 Fed. 2d 1171 (7th Cir. 1981).

Considering that the above question is at least to be one of a Federal nature under the mandate of *Rushen* v. *Spain*, 664 U.S. 114, 104 S.Ct. 453, 78 L.Ed. 2d, 267

(1983), it is plainly clear that under the holding of *Holloway* v. *Arkansas*, supra, reversal is automatic where is a Defendant is deprived of assistance of counsel "either through the prosecution or during a critical stage in, *at least, the prosecution of a Capital offense*" citing three capital cases of *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, L.Ed. 2d 799 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7th L.Ed. 2d 114 (1961); *White* v. *Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed. 2d 193 (1963).

The Texas Court's majority opinion in a footnote tries to distinguish *Holloway* v. *Arkansas*, supra. What is overlooked, however, is that a Court order presented by the prosecutors representing the State of Texas for these "experts" to examine the Defendant is tanamount to state action, which without disclosures to such counsel, is effectively a denial of counsel through State action and interference.

In *Geders* v. *United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 3d 592 (1976), counsel was prohibited by the trial judge from communicating with his client during overnight recess; the Court there held that the defendant's rights to be heard by counsel had been abridged. The right to have counsel provided is so fundamental that its' violation of that Constitutional right mandates revesal even if no prejudice is shown and *even if the Defendant was clearly guilty. United States* v. *Decoster*, 624 Fed. 2d 201. See also *United States* v. *Velasquez*, 772 Fed. 2d 1348 (7th Cir. 1985) See also *Walberg* v. *Israel*, 766 Fed. 2d 1171 (7th Cir. 1985).

Under *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), if the Court is satisfied *beyond a reasonable doubt* that the error did not contribute to the Defendant's conviction (or in this case the Defendant's death penalty), such error would be harmless. However, as in *Chapman*, continuous and repeated references were made to *Chapman's* failure to testify in that the inferences drawn therefrom did not constitute harmless error. In the instant case, however, it is without question that the prosecution argued to the jury reminding them that Dr. Grigson is the "Dallas Psychiatrist and Medical Doctor as compared to a mere psychologist employed by Bexar County and then recounted that Dr. Grigson" tells you that on a range from one to ten [Petitioner is] a ten plus" followed with an iteration of terms Dr. Grigson can "explicate so expertly to jurors." As stated in the dissenting opinion, "one may reasonably believe the State's case during the punishment hearing" could have been significantly less persuasive had the evidence been excluded." It is without question that such argument falls within the very concise reasoning that was the concern the *Chapman* Court had before it when rendering this decision 19 years ago. It is without question that there was a very probable impact to the jury of the erroneously admitted evidence in the minds of such fact-finders during the punishment phase of Appellant's trial.



In *Battie* v. *Estelle*, 655 Fed. 2d 692 (5th Cir. 1981) the State called eleven witnesses to testify concerning the Defendant's bad reputation and two more who recounted specific acts of violence made by him (the same as in the SATTERWHITE trial) yet introduction of psychological testimony in violation of *Smith* was not deemed harmless by the Fifth Circuit.

In *White* v. *Estelle*, 720 Fed. 2d 415 (5th Cir. 1983) the Fifth Circuit expressly rejected the prosecution claim that a *Smith* error was harmless. The Court held:

> "We cannot concluded that evidence admitted on critical issue in the sentencing phase of a capital case, in violation of White's constitutional rights, constitutes a harmless error beyond a reasonable doubt."

720 Fed. 2d 418. Similarly, in *Green* v. *Estelle*, 706 Fed. 2d 148 *rehearing denied with opinion*, 712 Fed. 2d 995, the Court of Appeals granted *Smith* relief despite a strenuous harmless error argument by the Texas Attorney General.

Indeed, under Texas law, the erroneous admission of far less damaging evidence at the penalty phase of a Capital trial has been held prejudicial and reversible. See *Cortez* v. *State*, 571 S.W. 2d 308 (Tex. Cr. App.); *Clark* v. *State*, 627 S.W. 2d 693, 697-698 (Tex. Cr. App. 1981).

The reasoning underlying the above decisions is obvious and compelling. The expert testimony deemed inadmissible in *Smith* is not merely one more item of evidence to be weighed against the other, properly admitted evidence, in reaching a harmless error determination. Such expert testimony speaks directly, and with the appearance of weighty scientific authority, to the very question of probable future dangerousness posed by Article 37.071 (b)(2) of the Texas Code of Criminal Procedure. It does not simply provide the jury with evidence to apply in searching for an answer to the statuary sentencing questions. Instead, it purports to answer the question itself, as a matter of science no less. This is the very reason the *Smith* errors cannot be deemed harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, (1967).



## CONCLUSION

To send Petitioner to his death on the basis of his statements to Doctors Schroeder and Grigson, unwittingly made without the guidance of counsel, and without the slightest awareness that he was assisting the State's effort to take his life, simply cannot be squared with these concepts. Accordingly, the judgment of the District Court and Texas Court of Criminal Appeals should in all things be reversed.

Respectfully submitted,

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# RESPONDENT'S

# BRIEF

No. 86-6284

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1987

JOHN T. SATTERWHITE,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

## RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED

I. Whether the admission of psychiatric testimony at the punishment phase of Satterwhite's capital murder trial deprived him of his sixth amendment right to counsel in violation of *Estelle v. Smith*, 451 U.S. 454 (1981).

II. Whether, if there was a *Smith* violation, it was harmless beyond a reasonable doubt.

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***Respondent.***

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# RESPONDENT'S BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief.

## OPINION BELOW

The opinion of the Texas Court of Criminal Appeals was delivered on September 17, 1986, and is

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[1] For clarity, the Respondent is referred to as "the state," and petitioner as "Satterwhite."

published as *Satterwhite v. State*, 726 S.W.2d 81 (Tex. Crim. App. 1986), (A.78-102).[2] Satterwhite's motion for leave to file motion for rehearing was denied on December 3, 1986.

## JURISDICTION

Satterwhite has invoked the jurisdiction of this Court under the provisions of 28 U.S.C. 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Satterwhite bases his claims upon the fifth and sixth amendments to the United States Constitution.

## STATEMENT OF THE CASE

### *A. Course of Proceedings Below*

Satterwhite was indicted on April 4, 1979, in Bexar County, Texas, for the murder of Mary Francis Davis, while in the course of committing and attempting to commit the offense of robbery. Trial began on September 17, 1979, and on September 19, 1979, the jury found Satterwhite guilty of the offense of capital murder. On September 20, 1979, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon 1979).[3] Accordingly,

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2 "A." refers to the Joint Appendix, "SF" refers to the statement of facts of Satterwhite's trial, and "Tr." refers to the transcript.

3 Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1979) provides, in pertinent part, as follows:

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the

*(footnote continued on following page)*



punishment was assessed at death. Satterwhite's conviction and sentence were affirmed by the Texas Court of Criminal Appeals, which affirmed on September 17, 1986. *Satterwhite v. State*, 726 S.W.2d 81 (Tex. Crim. App. 1986). On June 1, 1987, the Court granted Satterwhite's petition for writ of certiorari on the question whether

> Petitioner was denied effective assistance of counsel, a fair and impartial trial, equal protection of law, due process of law and his right to be free from cruel and unsual punishment guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution because the trial court allowed witness, James Grigson, M.D., to testify to evidence obtained in violation of Article I, Section 10, of the Texas Constitution and in violation of the fifth, sixth and fourteenth amendments of the Constitution of the United States.

*Satterwhite v. Texas*, ___ U.S. ___, 55 U.S.L.W. 3807.

### *B. Statement of the Facts*

Satterwhite was arrested on March 13, 1979, less than two days after the commission of the capital murder[4] and charged with the offense on March 15, 1979 (Tr. 3). On

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*(footnote continued from previous page)*

reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

4 The facts surrounding Satterwhite's arrest are set forth in the opinion of the court below (A. 87-90).

March 16, 1979, the state filed a motion for psychological examination requesting evaluation for purposes of determining competency to stand trial, sanity at the time of the offense, and "also with regard to the defendant's propensity for violence and dangerousness in the future as well as the likelihood of the defendant committing future acts of violence." (A. 3; Tr. 1). Dr. Betty Schroeder was appointed that day (A. 5; Tr. 2).

Dr. Schroeder examined Satterwhite on March 16, 1979. Prior to any conversation, she administered *Miranda*[5] warnings off the standard police issued card. She discussed with Satterwhite whether an attorney had been appointed (A. 47; SF VIII 2659). At no time prior to or during the interview did Satterwhite request counsel (A. 47; SF VIII 2642), and he signed a release form prior to examination.

VOIR DIRE EXAMINATION ON BEHALF OF DEFENDANT BY MR. WOODS:

Q. Dr. Schroeder, my name is Richard Woods one of the attorneys appointed and I have never met you but I have heard about you. You had a conversation and conference with John Satterwhite?

A. Yes. I did.

Q. Okay. Prior to having this conversation with him did you give him any warnings or tell him what you were doing was going to be used in Court against him?

A. Yes. I did.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).



Q. How did you tell him this?

A. Discussing it with him and I keep a little card in my billfold that I refer to the Miranda warnings.

Q. What kind of card do you keep in your billfold, do you have that available?

A. I have it back in the other office. I keep it in my billfold at all times.

Q. You don't carry your billfold with you at all times?

A. All times except I don't have it now.

THE COURT: Is it one of the cards the police department issues?

THE WITNESS: I got it from them. Yes.

THE COURT: The Court will take notice that contains the Miranda Warning.

ON BEHALF OF THE DEFENDANT BY MR. WOODS:

Q. And you gave Mr. Satterwhite the Miranda warnings so to speak that he had a right to have a lawyer to be present during this?

A. Yes. We discussed it and even I asked him to sign a release in order that I might appropriately release the information he was to give me.

Q. Did he sign the release?

A. He did.

Q. And did he have a conversation with you?

A. Yes. Rather lengthy one.

Q. How long did that last?

A. I have seen him on a number of occasions. On that particular occasion I would say probably no more than an hour or hour and fifteen minutes.

Q. And he at no time during this interview or conference asked that a lawyer be present or anything of that nature?

A. No. Not at that time.

Q. What date was this that you saw him and you gave him this warning?

A. I believe I received the order and executed it on the same day, March 16, 1979.

(A. 46-48; SF VIII 2641-43; *see* SF VIII 2646-47).

At the punishment phase of trial, Dr. Schroeder testified that on March 16, 1979, she administered various standardized tests (A. 51-52; SF 2648-51). She attempted to further test Satterwhite on a number of other occasions, but Satterwhite refused (A. 51, 53-54; SF VIII 2648, 2652-53). In particular, on April 8, 1979, Dr. Schroeder sent an associate to evaluate him, but Satterwhite gave "her an answer which was evasive and he did not care to participate at that time." (A. 53; SF



VIII 2652).[6] "In most cases it wasn't in regard to his rights. It was with regard to some physical conditions such as being hungry, being tired, it being too early or too late." (A. 57; SF VIII 2648). In response to the state's questions regarding Satterwhite's character and without objection from the defense, Dr. Schroeder opined that he was of average intelligence, that he had a facade of cooperativeness but was guarded in many respects,[7] that he had an antisocial personality, and that he would constitute a continuing threat to society (A. 56; SF VIII 2655-57).

Subsequent to the appointment of counsel,[8] on April 17, 1979, the state filed with the trial court a second motion for psychiatric evaluation again for the purpose of determining Satterwhite's competency, sanity, and "propensity for violence and dangerousness as well as the likelihood of [his] committing future acts of violence." The state requested evaluation by Dr. John T. Holbrook and Dr. Schroeder (A. 12; Tr. 22), and the motion was granted on April 18, 1979 (A. 14; Tr. 23).

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[6] The defense objected to the response as hearsay, and the objection was sustained.

[7] "The guardedness that I saw in many respects and the very cunning kind of guardedness. In fact he examined the release with such tenacity that I was really surprised. He even told me a few things because I was questioning why he made a multitude of marks on the back of it. He told me other experiences he had where he felt his rights had been violated." (A. 54-55; SF VIII 2654).

[8] Defense attorney Rick Woods was appointed on April 10, 1979 (A. 7-8; Tr. 15), and was officially notified of his appointment on April 13, 1979 (A. 11; Tr. 17), the same day a written waiver of reading of the indictment, signed by both him and Satterwhite, was filed with the court (Tr. 20). On May 27, 1979, Woods filed a motion requesting additional counsel (Tr. 52-53), and on July 25, 1979, Steve Takas was appointed co-counsel (A. 24; Tr. 61).

On May 18, 1979, a psychological report prepared by Dr. James P. Grigson on May 8, 1979, was filed in the trial court pursuant to court order (A. 15-16; Tr. 30).[9] Dr. Grigson examined Satterwhite on May 3, 1979, after administering warnings and specifically informing him that the evaluation would include the future dangerousness issue.

A. I first attempted to examine him on March the 19th of this year but the first time I was able to examine him was May 3rd of this year.

Q. And prior to the examination did you give him any type of admonitions to him in the way of warnings?

A. Yes, sir. I did. I explained to him on both occasion the purposes of the examination in terms of the three questions, that I was primarily doing the evaluation in order to determine the question of competency, and the question of sanity or insanity and the question of whether or not he presented a continuing threat to society, whether or not there was a question as to propensity of violence, dangerousness.

I also, after explaining what those three questions meant, explained to him that I did state that there was a Federal Judge by the name of Judge Robert Porter in Dallas who had ruled in cases in a case where if an individual was charged with Capital Murder

[9] Dr. Grigson testified that the examination was performed pursuant to a court order (SF VIII 2694, 2708), but that order is not identified in the record on appeal.



that they had the right or the option to remain silent or to simply refuse the examination and no psychiatric examination would take place. Now, I did give him all of that on both occasions.

Q. And in response to your admonitions on both occasions did he at any time agree to confer with you?

A. Yes, sir. He did.

Q. Did you at any time tell him that whatever or the results of your conference or interview with him could be used against him in a court of law?

A. I told him with regard to the question of dangerousness that if he were to be found guilty of Capital Murder that then in the second phase of the trial, in the punishment phase, that if I found him or any psychiatrist who examined him found him to be dangerous that this could be used in testifying with regard to the case. It could result in his getting possibly the Death Penalty.

(A. 60; SF VIII 2685-86; *see also* VIII 2700-02). In addition to finding Satterwhite competent to stand trial and sane at the time of the offense, Dr. Grigson diagnosed him as sociopathic and constituting a continuing threat to society (A. 71-72; Tr. 30; SF VIII 2704-08).

On May 29, 1979, the defense filed a motion to restrict access to Satterwhite requesting that no person be allowed to interview or contact him without first obtaining express written consent of his court-appointed attorneys or by court order obtained only after an adversary hearing with notice to counsel (A. 17-18; Tr. 40) as well as a motion to require the state to divulge the names of its witnesses (A. 19-20; Tr. 46). Both motions were granted that date (Tr. 41, 47; SF II 280-81). On August 24, 1979, Satterwhite moved for psychological examination to determine competency to stand trial and insanity at the time of the offense. Neither defense, however, was pursued at trial. Satterwhite produced no evidence at either the guilt or punishment phases of trial.

## SUMMARY OF ARGUMENT

Dr. Grigson's psychiatric examination of Satterwhite was not conducted in violation of *Estelle v. Smith*, 451 U.S. 454 (1981). Defense counsel was put on notice by the state's motions and court's orders, which were on file, that his client was to be examined with regard to the special issues at the punishment phase of trial. Because competent counsel must be charged with notice of the case file and because the prosecution was not guilty of any misconduct in connection with Dr. Grigson's examination, there was no sixth amendment violation.

Alternatively, any error was harmless beyond a reasonable doubt. Given the brutal facts of the offense and the lay testimony as to Satterwhite's bad reputation, criminal history and violent nature, the jury easily could have reached the same verdict on punishment absent any psychiatric testimony, particularly since Satterwhite introduced no evidence at either the guilt or punishment phases of trial. When the



testimony of Dr. Schroeder is considered along with all the other evidence, it cannot be gainsaid that the jury would have reached the same result had it not heard Dr. Grigson's testimony. *A fortiori*, any error in the admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt.

## ARGUMENT

### I.

### THE ADMISSION OF DR. GRIGSON'S TESTIMONY DID NOT VIOLATE THE SIXTH AMENDMENT.

#### *A. Defense counsel was put on notice of the examination and its scope.*

The court below found that "Dr. Grigson's testimony was improperly admitted into evidence in violation of appellant's Sixth Amendment right to assistance of counsel." (A. 97). The court found a sixth amendment violation because Satterwhite's right to assistance of counsel had attached at the time that Dr. Grigson examined him and his "attorneys should have been informed that an examination, which would encompass the issues of future dangerousness, was to take place." (*Id.*) In fact, however, defense counsel were advised by motions of the state, granted by the trial court, that an examination was to take place and that its scope would extend to the future dangerousness issue. On the facts of this case, there can be no question that Satterwhite had the opportunity to consult with his attorneys prior to the examination, and, therefore, was not deprived of any constitutionally secured right.

The state announced its intent to have Satterwhite examined on the future dangerousness issue when, on March 16, 1979, it filed its first motion for a psychiatric examination. Therein, the state requested that the court appoint Dr. Schroeder to examine Satterwhite as to his competency and sanity "and also with regard to the defendant's propensity for violence and dangerousness in the future as well as the likelihood of the defendant to commit future acts of violence." (A. 3; Tr. 1). The state's motion was granted the same day (A. 5; Tr. 2). Counsel was notified on April 13, 1979, that he had been appointed to represent Satterwhite (A. 10; Tr. 17). Defense counsel appeared in court with his client that same day for arraignment (A. 1, 9; Tr. 8), at which time Satterwhite pled not guilty (A. 1) and he and counsel signed a written waiver of reading of the indictment (Tr. 20).

The state's second motion for a psychiatric examination was filed on April 17, 1979 (A. 12; Tr. 22), four days after the appointment of counsel and sixteen days before Satterwhite was examined by Dr. Grigson. This motion also requested an evaluation of Satterwhite's competency and sanity and "propensity for violence and dangerousness as well as the likelihood of the Defendant to commit future acts of violence" (*id.*) and was granted the following day (A. 14; Tr. 23).

Experienced defense counsel, whose effectiveness has not been questioned, had a professional obligation to consult with his client, which he did, and to review the file of the case, which the Court must presume he did. Competent counsel must be charged with knowledge of the prior orders of the court. Were the rule otherwise, competent counsel in a capital case would deliberately not consult the case file, thereby allowing the trial court and the state to commit reversible "error." From consultation with his client and review of the case file,



defense counsel necessarily discovered the state's motions for examinations as well as the orders granting them. Here, as in *Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2918 (1987), "[i]t can be assumed ... that defense counsel consulted with petitioner about the nature of this examination."

It is well settled that the prosecution cannot be charged with suppressing evidence that defense counsel "already has or, with reasonable diligence, he can obtain himself." *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977); *see also Hughes v. Hopper*, 629 F.2d 1036, 1039 (5th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). Similarly, defense counsel for Satterwhite should not be heard to complain of a lack of notice, given the motions and orders for psychiatric examinations which were on file. Because defense counsel had ample opportunity to consult with Satterwhite, there was no sixth amendment violation.

### *B. There was no prosecutorial misconduct in this case.*

Thus, this case is very different from *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle v. Smith*, the Court found that a pretrial psychiatric examination to determine whether a capital murder defendant would constitute a continuing threat to society was conducted in violation of the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. In that case, the trial court *sua sponte* appointed Dr. Grigson to examine the defendant on the issue of his competency to stand trial pursuant to Tex. Code Crim. Proc. Ann. art. 46.02 (Vernon 1974). Dr. Grigson examined Smith without giving any warnings regarding his fifth amendment privilege against self-incrimination and did not notify defense counsel of the psychiatric examination or that it would

encompass the issue of the defendant's future dangerousness. After the examination, Dr. Grigson reported to the court that Smith was competent to stand trial. At trial, no issue was raised as to Smith's competency to stand trial or as to the defensive issue of insanity at the time of the alleged offense. After Smith was convicted of capital murder at the guilt stage of the bifurcated trial, Dr. Grigson was called by the state at the penalty stage to testify that, based upon his examination, he considered Smith a severe sociopath who would commit violent acts in the future "if given the opportunity to do so." The jury subsequently returned affirmative answers to the special issues submitted under Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1974), and the court assessed the death penalty.

This Court held that because prior to the psychiatric examination Smith had not been warned that he had the right to remain silent and that any statement made could be used against him at the sentencing proceeding, admission at the penalty stage of Dr. Grigson's testimony on the crucial issue of future dangerousness violated the fifth amendment privilege against compelled self- incrimination. The Court further held that Smith's sixth amendment right to counsel was violated because defense counsel was not notified in advance of the psychiatric examination or that it would encompass the issue of future dangerousness and there was no affirmative waiver of the right to counsel.

Central to the Court's finding of a sixth amendment violation were the prosecution's surreptitious tactics which deprived Smith and his counsel of the opportunity to decide whether to participate in the examination. Not only were defense counsel not notified of the examination or its scope, the prosecution did not include Dr. Grigson's name on a list



of witnesses which it was required to furnish to the defense. *Smith*, 451 U.S. at 459. Further, defense counsel did not discover until after jury selection had begun that Dr. Grigson had submitted a psychiatric report to the trial court. *Id.* at 458 & n.5. Given this lack of notice to Smith and his counsel, the Court found that he "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471.

*Amicus* for Satterwhite argues, however, that "this case is even more egregious than *Smith*" because "the record contains no court order authorizing Grigson to interview petitioner for any reason" (Brief of *Amicus Curiae* N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereinafter "Am. Br.," 41) and the court's orders do not mention Dr. Grigson by name (Am. Br. 43). The state is unable to grasp the significance of this distinction. The trial court entered two orders for psychiatric examinations of Satterwhite, both of which granted motions by the state which requested that Satterwhite be evaluated with regard to the special issues on punishment. It is of no constitutional significance that those orders appointed practitioners other than Dr. Grigson. While the sixth amendment right to consultation with an attorney prior to an examination will "depend on counsel's awareness of the possible uses to which petitioner's statements in the proceedings could be put," *Buchanan*, ___ U.S. at ___, 107 S.Ct. at 2919, there is no requirement that the defense be supplied with the identity of the particular psychiatrist who conducts the interview.

*Amicus* also argues that the trial court's orders were insufficient to put counsel on notice as to the scope of the examination because they did not provide that Satterwhite was to be examined as to future

dangerousness (Am. Br. 42-43). This argument is disingenuous. Both the order of March 16 (A. 5; Tr. 2) and the order of April 17 (A. 14; Tr. 23) state that the trial court had ordered examinations pursuant to the state's motions. When the orders are read in conjunction with those motions, as they must be, and as competent defense counsel would, there can be no doubt as to the purposes for which the examinations were to be conducted. Here, as in *Buchanan*, "[t]here is no question that petitioner's counsel had this information." *Id.* at ___, 107 S.Ct. at 2919. This case is, therefore, very different from *Estelle v. Smith*. Given the notice afforded defense counsel and the absence of any prosecutorial misconduct, there was no violation of Satterwhite's right to counsel.

## II.

## ANY ERROR IN THE ADMISSION OF DR. GRIGSON'S TESTIMONY WAS HARMLESS BEYOND A REASONABLE DOUBT.

### *A. The harmless error doctrine is applicable to this case.*

#### 1. The harmless error doctrine applies to capital cases generally.

Assuming *arguendo* that Dr. Grigson's testimony was admitted in violation of *Estelle v. Smith*, any error was harmless beyond a reasonable doubt, as the court below correctly concluded. Harmless error rules are essential to the administration of justice. They "serve a very useful purpose insofar as they block setting aside



convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial," *Chapman v. California*, 386 U.S. 18, 22 (1967).

The qualitative difference between death and other punishments is not a sufficient basis for abrogation of the harmless error doctrine in capital cases. In *Smith v. Murray*, ___ U.S. ___, 106 S.Ct. 2661 (1986), the Court found that a habeas petitioner's challenge to the admission of psychiatric evidence at his capital trial had been procedurally defaulted by his failure to raise the issue on direct appeal, thereby waiving any error under state procedural rules. The Court held that the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), is fully applicable to capital cases.

> We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair" about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.

*Id.* at ___, 106 S.Ct. at 2668.

Just as there is no special exception for capital cases in application of the procedural default doctrine, there is none for the harmless error doctrine. It is doubtless true that organized opponents of the death penalty would welcome the imposition of overly stringent procedures in capital cases, thereby increasing the states' costs in carrying out their sentences. But any benefits derived from such procedures must be measured against the states' valid interest in the

enforcement of their penal statutes and the societal costs entailed. For that reason, the courts have held in capital cases that the erroneous admission of evidence can be harmless. *See, e.g., Andrade v. McCotter*, 805 F.2d 1190, 1193 94 (5th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 660 (1986); *Evans v. McCotter*, 790 F.2d 1232, 1240-41 (5th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 327 (1986).

### 2. The harmless error doctrine applies to denials of counsel.

Satterwhite, relying on *Holloway v. Arkansas*, 435 U.S. 475 (1978), also argues that he was denied counsel at a critical stage of the criminal proceedings against him and that such denial can never be harmless (Petitioner's Brief, hereinafter "Pet. Br.," at 7-8). As the court below correctly recognized, *Holloway* is limited to its particular facts (A. 99 n.5). In any event, there is ample authority for the proposition that the denial of counsel may be harmless. In *Milton v. Wainwright*, 407 U.S. 371 (1972), the Court held that the admission of a confession obtained in violation of the defendant's sixth amendment right to counsel was harmless beyond a reasonable doubt. Similarly, in both *Moore v. Illinois*, 434 U.S. 220 (1977), and *Coleman v. Alabama*, 399 U.S. 1 (1970), the Court found that the defendant was denied counsel at a critical stage and remanded for a determination whether the error was harmless.[10]

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10 *See also Meadows v. Kuhlman*, 812 F.2d 72 (2d Cir. 1987); *Felder v. McCotter*, 765 F.2d 1245 (5th Cir. 1985), *cert. denied sub nom. McCotter v. Felder*, ___U.S. ___, 106 S.Ct. 1523 (1986); *Mealer v. Jones*, 741 F.2d 1451 (2d Cir. 1984); *Robinson v. Percy*, 738 F.2d 214 (7th Cir. 1984).



### 3. The harmless error doctrine applies to the punishment phase of capital trials.

*Amicus* argues, without citation of authority, that it is difficult to assess the harm *vel non* of evidence improperly admitted at the punishment phase of a capital trial because the jury's sentencing decision is less structured than its determination of guilt and, therefore, "the capacity of an appellate court to assess what the jury would have done in the absence of the tainted evidence is correspondingly restricted." (Am. Br. 47-48). For this reason, it is argued, "the harmlessness of constitutional error at petitioner's capital sentencing proceeding should be determined solely by asking whether the evidence might have contributed to the jury's decision." (Am. Br. 48).

*Amicus'* argument is based on a faulty premise. There is no substance to the suggestion that a capital sentencing jury's decision-making is so unbridled that the wrongful admission of evidence can never be deemed harmless. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld the Texas capital sentencing scheme from a broad constitutional attack. In concluding that the Texas statute did not violate the eighth and fourteenth amendments, the Court adverted to the narrow focus allowed a capital jury in deciding whether to assess the death penalty.

> Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of

> mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offender before it can impose a sentence of death.

*Jurek*, 428 U.S. at 272-73.

The jury's discretion in deciding the punishment issues at a capital trial is no greater than at the guilt phase. Satterwhite cites no authority, and there is none, for the proposition that the harmless error doctrine is inapplicable, or should be more sparingly applied, to evidentiary errors at punishment. Further, although *amicus* asserts that prior to this case "no appellate court has ever found a Smith error harmless" (Am. Br. 49),[11] in fact the admission of psychiatric testimony in violation of a defendant's right to counsel may, in an appropriate case, be deemed harmless, as the Court has very recently stated. *Buchanan v. Kentucky*, ___ U.S. at ___ n.21, 107 S.Ct. at 2919 n.21. *See Cape v. Francis*, 741 F.2d 1287, 1295 (11th Cir. 1984)

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11 In *Muniz v. Procunier*, 760 F.2d 588 (5th Cir.), *cert. denied sub nom. McCotter v. Muniz*, ___ U.S. ___, 106 S.Ct. 267 (1985), the Fifth Circuit reversed the district court, which had found a *Smith* error to be harmless. In *Muniz*, the district court found the error harmless because of the other damaging evidence on punishment even though there was no other psychiatric evidence introduced. On appeal, the state conceded that the district court's opinion was incorrect under the law of the Fifth Circuit as expressed in *White v. Estelle*, 720 F.2d 415, 418 (5th Cir. 1983). As *amicus* notes (Am. Br. 50 n.13), since its decision in this case, the Court of Criminal Appeals has decided another case in which it found Smith error to be harmless. *Powell v. State*, ___ S.W.2d ___, No. 67,630 (Tex. Crim. App. July 8, 1987).



(psychiatric testimony admitted in violation of fifth amendment privilege against self-incrimination found to be harmless).

### *B. The correct standard for determining harmless error is whether, absent the improperly admitted evidence, the jury nonetheless would have reached the same result.*

Under *Chapman v. California*, the erroneous admission of evidence in violation of the Constitution does not mandate reversal of the conviction if it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The harmless error rule is founded on the realization that even the most scrupulously conducted trials are not likely to be unblemished:

> [G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not require such a trial.

*United States v. Hastings*, 461 U.S. 499, 508-09 (1983). It is, therefore, "the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hastings*, 461 U.S. at 509.

*Amicus* argues that the proper standard of review is "whether the evidence might have contributed to the jury's decision." (Am. Br. 48). This proposed standard would effectively eviscerate the harmless error doctrine. Because any relevant evidence before the trier of fact

"might" have contributed to its decision, there would never be an occasion when, under amicus' proposed rule, wrongfully admitted evidence could be deemed harmless. It is precisely this position which was rejected in *Chapman*.

> We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule.

*Chapman*, 386 U.S. at 21-22; *see also United States v. Lane*, __ U.S. __, 106 S.Ct. 725, 730 (1986), quoting *Chapman*. The proper inquiry is not whether the evidence "might" have affected the jury's verdict, but whether, absent the evidence, the jury would nonetheless have reached the same verdict. *Chapman*, 386 U.S. at 26.

### *C. There was overwhelming evidence to support the jury's affirmative answers to the punishment issues absent Dr. Grigson's testimony.*

#### 1. The jury could have reached the same verdict on punishment without considering any psychiatric testimony.

There was overwhelming evidence before the jury to support its affirmative answers to the punishment issues even absent Dr. Grigson's testimony. Indeed, the brutal facts of the offense, standing alone, were



sufficient under Texas law to justify imposition of the death penalty. *O'Bryan v. Estelle*, 714 F.2d 365, 386 (5th Cir. 1983), *cert. denied sub nom. O'Bryan v. McKaskle*, 465 U.S. 1013 (1984).

*Amicus* argues that the evidence admitted at the guilt phase should not be considered on the punishment issues because (1) Sharon Bell was not a credible witness and (2) the jury might have convicted Satterwhite on the theory that Bell was the actual killer. This first argument must fail, for two reasons. First, it flies in the face of the well established rule that once a defendant is convicted of a crime, a reviewing court must consider all the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Here, the jury obviously found Bell to be a credible witness, as evidenced by its verdict. Second, if the Court accepts this argument, it must review a cold record and substitute its own judgment as to the credibility of the witnesses, something which it cannot, and may not, do. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1039-40 (1984); *Maggio v. Fulford*, 462 U.S. 111, 117-18 (1983).

*Amicus*' other argument, that the jury might have believed that Bell was the actual killer, is equally unavailing.[12] The court below specifically found that "there is no evidence that Bell did the actual killing." (A. 92).[12] Thus, the jury could not have found Satterwhite

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12 Ordinarily, it would have been reversible error under Texas law for the trial court to have instructed the jury on the law of parties where there was no evidence to support such a charge. In the case at bar, however, the Court of Criminal Appeals found that any error was waived by Satterwhite's requested instructions, which were substantially the same as that given by the trial court (A. 94-95).

guilty on this theory.[13] However, even had it done so, there would be no constitutional barrier to imposition of the death penalty. *Tison v. Arizona*, ___ U.S. ___, 107 S.Ct. 1676 (1987).

In addition to the evidence admitted at the guilt stage, the jury was entitled to consider Satterwhite's extensive criminal record and bad reputation, as well as Satterwhite's failure to introduce any mitigating evidence, in deciding the punishment questions. Thus, even absent any psychiatric testimony for the state, the jury could easily have answered the punishment issues in the affirmative. *See Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) ("the jury may make up its mind about future dangerousness unaided by psychiatric testimony . . . .").

**2. The court below properly considered Dr. Schroeder's testimony in determining that the admission of Dr. Grigson's testimony was harmless.**

Particularly damning, however, was Dr. Schroeder's psychological assessment of Satterwhite, a diagnosis which paralleled that of Dr. Grigson. When her testimony is considered in conjunction with the other evidence offered by the state, there was overwhelming evidence on punishment. *See United States v. Lane*, ___ U.S. at ___, 106 S.Ct. at 732 & n.13 (overwhelming evidence of guilt is highly relevant to harmless error inquiry). Because the jury's verdict surely would have been the same had Dr. Grigson not

[13] "The assessment of prejudice [on a claim of ineffective assistance of counsel] should proceed on the assumption that the decisionmaker is reasonably, conscientiously and impartially applying the standards that govern the decision." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).



testified, his testimony was harmless beyond a reasonable doubt. *See Milton v. Wainwright*, 407 U.S. 371 (1972) and *Robinson v. Percy*, 738 F.2d 214 (7th Cir. 1984) (admission of coerced confessions harmless beyond a reasonable doubt where other, properly admitted confessions were before the trier of fact). Based on all the evidence introduced at the guilt and punishment phases, with particular emphasis on Dr. Schroeder's testimony, the court below found that Dr. Grigson's testimony was harmless.

> Dr. Schroeder's testimony was very similar to Dr. Grigson's concerning their conclusions about appellant. Both stated that appellant was a cunning individual, very evasive and very guarded. She added that appellant was a user of people, had an antisocial personality and an inability to feel empathy, and would be a continuing threat to society through his acts of criminal violence.
>
> The jury also had the evidence adduced at the guilt stage of the trial for its consideration in answering the special issues at the punishment phase. The evidence at the guilt stage was undisputed that appellant committed a brutal and senseless murder during the course of a robbery. Even though he had obtained the money from the cash register and safe, he shot the deceased two or three times in the head at close range so that there would be no witnesses. The facts of this crime show that appellant's conduct was calculated and remorseless.

> We conclude that the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" even if Dr. Grigson's testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt.

(A. 98-99) (citations omitted).

Satterwhite does not, because he cannot, argue that the court below applied an incorrect constitutional standard to the facts of his case. Instead, Satterwhite and the *amicus* advance a number of reasons why, in their view, the Texas appellate court wrongly concluded that Dr. Grigson's testimony was harmless.

*Amicus* argues that Dr. Schroeder's testimony "was admitted in patent violation of *Estelle v. Smith* and should never have reached the jury's ears in the first place." (Am. Br. 55). It is far from clear that Dr. Schroeder's examination of Satterwhite was conducted in violation of the fifth and sixth amendments. As the court below noted, "prior to examining appellant, Dr. Schroeder informed him of his rights as outlined in *Miranda v. Arizona, supra*. Additionally, the doctor obtained a release from appellant so as to allow her to release the information she obtained from the interview." (A. 98). Dr. Schroeder warned Satterwhite that, inter alia, the results of her examination were "going to be used in Court against him" (A. 46). Indeed, the warnings administered by Dr. Schroeder went beyond what is required by the Constitution. She told Satterwhite that "he had a right



to have a lawyer to be present during this" (A. 47), thus affording him a more extensive right to counsel than that required by *Estelle v. Smith*, 451 U.S. at 470 n.14.

In any event, the Court need not consider whether Dr. Schroeder examined Satterwhite in violation of *Estelle v. Smith*. The court below refused to consider this issue because Satterwhite did not object at trial to Dr. Schroeder's testimony or complain on appeal of its admission (A. 98). The Court of Criminal Appeals' refusal to consider the admissibility of Dr. Schroeder's testimony was thus based on an adequate and independent state ground which precludes review by this Court. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

*Amicus* argues that the Texas court's imposition of its contemporaneous objection rule was incorrect "as a matter of state law" (Am. Br. 56), an issue which is outside the ambit of this Court's certiorari jurisdiction. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dismension."). Further, *amicus* misconstrues the decision of the court below. The Court of Criminal Appeals did not hold that Satterwhite's claim was waived solely by his failure to interpose a trial objection. Satterwhite waived his claim by failing to object at trial and by failing to raise the issue on appeal (A. 98). Thus, the court below did nothing more than adhere to the time-honored rule that an appellate court will not review unassigned error.

In *Smith v. Murray*, the Court considered a factual situation remarkably similar to the case at bar. There, the habeas petitioner had objected at trial to the admission of psychiatric testimony but did not raise the matter as a ground on appeal. The Virginia state courts held that failure to raise the claim on appeal barred its consideration in any subsequent state proceeding, and this Court found that it was barred from federal habeas review under the procedural default doctrine of *Wainwright v. Sykes*. *Smith v. Murray*, ___ at ___, 106 S.Ct. at 2666.

Because the petitioner in *Smith v. Murray* did not establish either "cause" or "prejudice" so as to avoid the consequences of his procedural default, the Court undertook to determine whether the alleged error had resulted in a "fundamentally unjust incarceration," *i.e.*, "the conviction of one who is actually innocent." *Id.* at ___, 106 S.Ct. at 2668, quoting *Murray v. Carrier*, ___ U.S. ___, ___, 106 S.Ct. 2639, 2650, 2654 (1986). In concluding that it had not, the Court reasoned in terms particularly appropriate to the instant case:

> There is no allegation that the testimony . . . was false or in any way misleading. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, [the] testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society.



*Smith v. Murray*, ___ U.S. at ___, 106 S.Ct. at 2668 (original emphasis).

Here, as in *Smith v. Murray*, there is no allegation that Dr. Schroeder's testimony was false or misleading. Instead, her testimony was highly probative on the issue whether Satterwhite in fact constituted a continuing threat to society. Indeed, *amicus* implicitly acknowledges the accuracy of Dr. Schroeder's observations, at least to the extent that they suit his needs:

> The defense on summation argued the theory that Sharon Bell, deemed a non-credible witness by Dr. Schroeder, was the individual who actually killed the victim. . . . Defense counsel noted that the most gruesome testimony about the killing came from Sharon Bell, the prosecution's star witness at the guilt trial, whose veracity had been questioned at the penalty trial by Dr. Schroeder.

(Am. Br. 31).

Because there is no allegation that Dr. Schroeder's testimony was anything other than true and accurate, and because the state appellate court determined, as a matter of state procedural law, that it was properly before the trier of fact, it may be considered in determining whether Dr. Grigson's testimony was harmless. Inasmuch as the two witnesses' testimony was virtually identical, it follows as the night the day that any error in the admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt.

### 3. Dr. Grigson's testimony was not prejudicial *per se*.

*Amicus*' final argument is that Dr. Grigson's testimony can not be deemed harmless because it "was far more thorough, complete and self-assured" than that of Dr. Schroeder (Am. Br. 57). Indeed, *amicus* argues, Dr. Grigson's testimony can never be deemed harmless because of "the extraordinary skill with which it is delivered to the jury." (Am. Br. 59).

*Amicus*' position is not well taken, either factually or legally. First, *amicus* does not demonstrate in what way Dr. Grigson's testimony was more complete or how it was thereby more prejudicial. Second, as the Court has previously noted, an expert witness's high degree of self-assurance may undermine, rather than bolster, his credibility. *See Barefoot v. Estelle*, 463 U.S. at 905 n.11 ("The more certain a State's expert is about his prediction, the easier it is for the defendant to impeach him."). It is mere self-serving speculation to assert that Satterwhite's jury found Dr. Grigson's testimony to be critical on the punishment issues.

Further, *amicus* again asks this Court to decide legal issues based on de novo credibility determinations made from a cold record. Because Dr. Grigson is a credible witness, the argument goes, his testimony necessarily was harmful. Here, however, as in *Smith v. Murray*, there is no indication that Dr. Grigson's testimony was false or misleading. Just as there is no substance to the argument that the admission of psychiatric testimony can never be harmless error, there is no support for the proposition that the testimony of a particular expert can never be deemed harmless.



Satterwhite's case cries out for application of the harmless error doctrine. The state proved the commission of a cold-blooded, gratuitous murder in the course of robbery to establish that Satterwhite was guilty of capital murder. At the punishment phase, the state introduced lay testimony to establish Satterwhite's poor reputation, criminal record and proclivity for violence. The state also introduced the virtualiy identical testimony of two expert witnesses on the special punishment issues. Satterwhite produced no evidence whatsoever at either the guilt or punishment stages. On these facts, the admission of Dr. Grigson's testimony was harmless beyond any doubt.

## CONCLUSION

For the above reasons, the state requests that the judgment of the court below be affirmed.

Respectfully submitted,

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# AMICUS CURIAE

# BRIEF

No. 86-6284



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. SATTERWHITE,

*Petitioner,*

v.

STATE OF TEXAS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS



## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the admission of the testimony of Dr. James P. Grigson at petitioner's penalty trial violated his Sixth Amendment rights under Estelle v. Smith, 451 U.S. 454 (1981).

2. Whether the violation of petitioner's rights under Smith may be deemed harmless error.

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ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

# BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

## STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent indigent death-sentenced

prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. E.g., Furman v. Georgia, 408 U.S. 238 (1972); Lockett v. Ohio, 438 U.S. 586 (1978); Enmund v. Florida, 458 U.S. 782 (1982). The Fund has also appeared before this Court as amicus curiae in capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Adams v. Texas, 448 U.S. 38 (1980); Barefoot v. Estelle, 463 U.S. 880 (1983).

The Fund has been long involved with issues raised by prosecutorial use of psychiatric testimony at the penalty phase of Texas capital cases. The Fund represented the successful death-sentenced prisoner in Estelle v. Smith, 451 U.S. 454 (1981), aff'g 602 F.2d 694 (5th



Cir. 1979), aff'g 445 F.Supp. 647 (N.D. Tex. 1977), at all three levels of his federal habeas corpus proceeding. During the pendency of Smith and thereafter, we provided consultative assistance to many Texas attorneys representing death-sentenced prisoners on Smith issues. The Fund was counsel of record or amicus curiae in three cases before the United States Court of Appeals for the Fifth Circuit involving prosecutorial claims that Smith error should be deemed harmless. Muniz v. Procunier, 760 F.2d 588 (5th Cir. 1985), cert. denied, ___ U.S. ___, 88 L.Ed.2d 274 (1985); Green v. Estelle, 706 F.2d 148 (5th Cir. 1983), rehearing denied with opinion, 712 F.2d 995 (5th Cir. 1983); Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981).

Because of the Fund's extensive experience and intimate familiarity with

Smith questions, we believe that we can be of assistance to the Court in this case. Consent has been granted by both parties to the filing of this amicus curiae brief.

## OPINIONS BELOW

The majority and dissenting opinions of the Texas Court of Criminal Appeals are reported at 726 S.W.2d 81 (Tex. Crim. App. 1986).

## JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. §1257(3). Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on September 17, 1986, and rehearing was denied on December 3, 1986. A timely petition for writ of certiorari was filed, and on June 1, 1987, this Court granted certiorari. ____ U.S. ___, 55 U.S.L.W. 3807.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Tex. Code Crim. Pro. Art. 37.071 (reproduced as an Appendix to this brief).

## STATEMENT OF THE CASE

On September 19, 1979, petitioner was convicted of capital murder for the March 12, 1979 killing of Mary Frances Davis, clerk at a Lone Star Ice and Food Store in San Antonio, Texas, during the commission of a robbery. On September 20, 1979, after a penalty trial conducted pursuant to Tex. Code Crim. Pro. Art. 37.071, the jury answered "yes" to the statutory special issues which determine the sentence in Texas capital cases. Accordingly, petitioner was sentenced to die.

**The Guilt Trial**

The prosecution's non-accomplice testimony established that: (i) petitioner and Sharon Bell were seen in the store by several customers shortly before the crime, although none of these customers observed the robbery, murder or getaway; (ii) the victim's body, discovered by subsequent customers and the police, had one close-range bullet wound in each temple; (iii) a .22 caliber pistol used by the perpetrator was found the following evening in the glove compartment of a car driven by petitioner, a six foot tall black male weighing about 160 pounds, when that vehicle was stopped for speeding in nearby Live Oak, Texas; (iv) Sharon Bell, a six foot tall black woman weighing approximately 220-250 pounds, was in the passenger seat of the car when it was



stopped in Live Oak; (v) Sharon Bell repeatedly told the arresting officer in Live Oak that the gun was hers and that John Satterwhite knew nothing about it, and gave a sworn statement to that effect; (vi) while the arresting officer searched the car, petitioner stood behind it as ordered by the officer but Bell kept making movements toward it until twice ordered by the officer to stop; and (vii) the pistol had been purchased from a pawn shop by petitioner's mother two weeks earlier. JA 83-84, 88-90; Satterwhite v. State , 726 S.W.2d 81, 86, 88-89 (Tex. Crim. App. 1986); SF 333, 341, 343, 2453-54, 2461, 2468-69 (testimony of arresting officer).[1]

The only direct evidence about the

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[1] Numbers preceded by "JA" refer to pages of the Joint Appendix; those preceded by "SF" refer to pages of the Statement of Facts before the Texas Court of Criminal Appeals.

robbery and murder was the accomplice testimony of Sharon Bell. The record establishes that Bell previously had been convicted of murder with malice, SF 2317, and at the time of petitioner's trial was under indictment for (i) the capital murder of Mary Frances Davis, (ii) another capital murder and (iii) the aggravated robbery of a liquor store, SF 2286. She had been hospitalized for mental illness on several occasions, and had been discharged from a mental hospital only about a month before the instant offense. SF 2278, 2287-88, 2321-23, 2333. She had been living with petitioner, and had spent a couple of nights in a house occupied by petitioner and his mother, around the time of the offense. SF 2323-24. The prosecutor conceded before she took the stand that:

> I have promised her if she'll testify to the truth that I will not



> seek the Death Penalty against her.
>
> MR. TAKAS [Defense Counsel]: That is in both cases that she's charged with?
>
> MR. HARRIS [Prosecutor]: Both cases.

SF 2275.

Bell's version of the robbery and murder, as recounted by the Texas Court of Criminal Appeals, was the following:

> [A]ppellant and Bell approached the cash register where the deceased was standing. Bell asked for two or three packages of Kool cigarettes. The deceased placed them on the counter, whereupon the appellant pulled a pistol out, pointed it at the deceased, and demanded that the deceased give him money. The deceased opened the cash register and placed the money in a paper sack. The deceased then volunteered that there was more money in the vault. The three went to the vault where the deceased opened the vault and placed the contents in the sack and handed it to Bell. Bell then headed for the door. When she left the vault area, the appellant was pointing the gun towards the deceased's temple. As she was leaving the store she heard the deceased ask the appellant not to shoot her. She then heard two or three gunshots. The pair got in the

> car and left. When she asked the appellant why he shot her, he stated he did not want to leave any witnesses.

JA 87-88; 726 S.W.2d at 88.

At the conclusion of her direct examination by the prosecutor, Bell testified as follows:

> Q. Now, you and I talked about two weeks ago, did we not?
>
> A. Yes.
>
> Q. Did we discuss your testimony here today?
>
> A. Yes.
>
> Q. Can you tell the jury what promises I made you, if I did?
>
> A. None.
>
> Q. Didn't I tell you though that I would not seek the Death Penalty in your case if you would tell the truth about this case?
>
> A. Yes.

SF 2318-19.

The defense called no witnesses and introduced no evidence at the guilt



trial. The trial court instructed the jury on the Texas law of parties, under which petitioner could be convicted as an accomplice even if Sharon Bell shot the victim.[2]

**The Penalty Trial**

The non-expert testimony at petitioner's penalty trial was summarized by the Texas Court of Criminal Appeals as follows:

> [E]ight peace officers testified that appellant's reputation for being a peaceful and law abiding citizen was bad. One of the officers stated that he had a confrontation with appellant. He said that after receiving a complaint about appellant, he attempted to question him. As he approached appellant, appellant reached inside his waistband. The officer grabbed his hand and found a loaded pistol inside appellant's waistband.
>
> Lee Roy Merriweather testified that he used to be married to appellant's mother. He stated that less than a year before the present offense, he had an argument with

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2 JA 90-95; 726 S.W.2d at 89-91.

> appellant. Merriweather locked appellant out of their home and he responded by shooting at Merriweather through the door. The witness was hit twice and was hospitalized for a month.
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> The evidence presented also showed that appellant had been convicted of aggravated assault, burglary with intent to commit theft, theft under fifty dollars, and robbery by assault with fire-arms.

JA 97-98; 726 S.W.2d at 93. Petitioner had been placed on probation for the theft (1968), sentenced to 30 days in jail on the assault (1968), and placed on probation for the robbery (1970). On the burglary, the last of the convictions (1972), he had been sentenced to the Texas Department of Corrections for 2-6 years; he was released in 1974 and had no further convictions until the instant case. SF 2721-22.

The prosecution presented the expert testimony of Dr. Betty Lou Schroeder, a San Antonio psychologist, and Dr. James



P. Grigson, a Dallas psychiatrist. The record reflects that on March 16, 1979, three days after petitioner's arrest in Live Oak and one day after he had been formally charged with capital murder (JA 6), the prosecution had filed a motion requesting appointment of a "disinterested, qualified Psychologist" to conduct an examination as to petitioner's competency to stand trial, his sanity at the time of the offense, and his "propensity for violence and dangerousness in the future as well as the likelihood of the defendant to commit future acts of violence." JA 3.[3] That same day the court appointed Dr. Schroeder to conduct an examination. JA 5. Petitioner was indicted on April 4, 1979,

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3 Tex. Code Crim. Pro. Art. 37.071(b)(2) requires the prosecution to prove this likelihood beyond a reasonable doubt in order to obtain a death sentence.

SF 5-6, and defense counsel was appointed on April 10, 1979, JA 7-8. On April 17, 1979, the prosecution filed a motion seeking the appointment of Dr. John T. Holbrook, a psychiatrist, and Dr. Schroeder, again to conduct an examination with respect to petitioner's competency, sanity, and "propensity for violence and dangerousness as well as the likelihood of the Defendant to commit future acts of violence." JA 12-13; SF 22. The motion does not reflect any certificate or other proof of service upon defense counsel. Ibid. The following day the trial court entered an order appointing Doctors Holbrook and Schroeder to conduct an examination. JA 14. As the Court of Criminal Appeals noted, "[t]he record does not contain a court order instructing Dr. Grigson to examine appellant," but Dr. Grigson



claimed at trial that he did examine petitioner "pursuant to a court order." JA 97; 726 S.W.2d at 92. The record contains a letter from Dr. Grigson to the trial court, dated May 8, 1979, stating that he examined petitioner in the Bexar County Jail on May 3. The letter concludes with the statement that petitioner "is a severe antisocial personality disorder [sic] and is extremely dangerous and will commit future acts of violence." JA 15-16.[4]

On May 29, 1979, defense counsel filed a "motion to restrict access to the defendant," alleging that he "has previously been interviewed by certain psychologists and/or psychiatrists at the State's insistence and request and without the benefit of counsel," and that

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[4] Dr. Holbrook also examined petitioner, SF 305, but the prosecution did not call him as a witness at trial.

the defense feared additional prosecutorial efforts to have him interviewed by medical experts or police officers. JA 17. The motion was granted the day it was filed. SF 41. That same day defense counsel filed a motion to suppress various evidentiary items, paragraph 5 of which requested suppression on Sixth Amendment grounds of:

> The testimony of any and all psychiatrists, psychologists or neurologists who have been appointed and/or who have examined the Defendant since the time of his arrest in March, 1979, for the present crimes....

JA 22. This paragraph of the motion bears the court's endorsement of the words "Hearing granted" in the left-hand margin. SF 55; see also JA 44-45. However, on August 30, 1979, the court declined to conduct a pretrial hearing on this issue:

> What I'm doing is denying you a hearing before trial on whether or



> not testimony that we may not reach in the trial is going to be admissible. When we get to any psychiatrists, feel free to object, feel free to object to any question and I'll rule on that at that time.

SF 320-21.

Dr. Schroeder was called to testify at the penalty trial. Upon voir dire examination outside the jury's presence, she testified that she first examined petitioner on March 16, 1979, the same day that the prosecution had filed a motion seeking an examination and the court had entered an order appointing her. JA 47-48. She initially read petitioner the Miranda warnings from a little card she carried in her billfold. JA 47. She then asked him to sign a release; he did so, and she conversed with him for the next hour or hour and fifteen minutes. Ibid. When questioned by defense counsel as to whether petitioner asked for a lawyer during this

initial interview, she replied "No. Not at that time." Ibid. Dr. Schroeder saw petitioner "on a number of occasions" after the initial interview. Ibid. At the conclusion of voir dire examination, the court instructed Dr. Schroeder not to "relate anything that the Defendant might have told you." JA 48.

With the jury present, Dr. Schroeder testified that following the initial examination she saw petitioner "on a number of occasions after that" and also "sent my psychological associate over to conduct some tests." JA 51. Petitioner completed one of the subsequent tests with the associate, JA 51, 52, but otherwise refused to be tested or interviewed again, JA 51. Two tests, the Bender-Gestalt and Rorschach, were conducted by Dr. Schroeder on March 16 along with her interview. JA 51-52. Dr.



Schroeder recounted several other approaches by her and her associate, including one by the associate on June 4, 1979 and one by her only two or three weeks before trial (i.e., in August or September 1979). JA 54.

The prosecutor asked Dr. Schroeder to testify "[b]ased on your experience as a clinical psychologist and based upon your clinical interview, the tests that you administered and the observations that you have made of this Defendant," JA 54. She replied that petitioner was a "very evasive, very guarded individual" who displayed a "very cunning kind of guardedness." Ibid. "He is a cunning individual, very evasive, very guarded. A user of people. Particularly noticeable was his lack of ability to feel what other people feel. An inability to feel what we call empathy." JA 55. Dr.

Schroeder further testified that petitioner was "particularly unable to feel feelings of guilt." JA 56. She also stated that:

> He tends to be an individual who has a rather bold representation of himself, particularly as a male. His masculinity, sexuality. It was my opinion that beneath this kind of representation was a very insecure individual who had very real doubts about his own ability to perform.

Ibid. Dr. Schroeder diagnosed petitioner as an "antisocial personality" and testified that he "will be a continuing threat" to society. Ibid.

On cross-examination, Dr. Schroeder stated that following the initial examination of petitioner there were "a number of other times I had conversation with him." JA 57. When asked whether she had warned him of his rights "at every subsequent visit," she replied:

A. I don't recall that I did.

Q. Were you aware of a Court order



signed in May asking you to inform counsel for the Defendant when you did that?

A. An order in May? I only have a copy of one order and it's dated March 16th.

Q. Did you ever make an attempt to get hold of his attorneys and talk to his attorneys about the possibility of speaking to my client?

A. No.

Q. Did you know he had an attorney appointed to represent him?

A. I assumed it would be so. At the time I originally saw him on March 16th I don't believe an attorney had been appointed. We talked about that I believe.

JA 57.

At the conclusion of her cross-examination, Dr. Schroeder testified that she had also examined Sharon Bell. Defense counsel asked:

> Q. Did you come to the conclusion that after discussing with her that she was a person whose relations, what she related to you lacked a certain amount of credibility?

A. Yes.

Q. Are you still of that opinion?

A. Yes.

JA 58.

Q. Your opinion would be that you arrived at would be that Sharon Bell's story lacks credibility from your evaluation of her?

A. I don't have the evaluation of her here but I can assure you that I have some doubts about Miss Bell on a number of areas.

JA 59.

The prosecution's concluding witness at the penalty trial was Dr. Grigson. Upon voir dire examination outside the jury's presence, Dr. Grigson testified that he had attempted to examine petitioner on March 19, 1979 -- three days after the court order appointing Dr. Schroeder -- but was not able to examine him until May 3, 1979. JA 60. Dr. Grigson said that he explained the purposes of the examination to petitioner



and advised petitioner of his right to remain silent or refuse the examination. Ibid. At first the doctor maintained that he had advised petitioner of the possibility that the examination could lead to adverse testimony at the penalty phase of a capital trial and result in a death sentence. Ibid. However, when pressed as to whether he had specifically warned petitioner that "the fruits of that conference or interview could be used against him," Dr. Grigson replied:

> No, sir. I didn't use those words. I did say that it could be harmful to him or it could be helpful to him depending upon what the findings would be.

JA 61.[5]

The trial court instructed Dr. Grigson not to relate to the jury anything petitioner might have said to

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[5] Dr. Grigson testified to the same effect before the jury. JA 70.

him. JA 61. However, defense counsel's objection to the doctor testifying at all was denied. JA 62.

With the jury present, Dr. Grigson testified that he had subjected petitioner to a "mental status examination" on May 3, 1979. JA 65-66. The doctor described the nature of the examination in considerable detail. JA 66-68. Before he could testify as to his findings, defense counsel twice objected on the grounds set forth in the pretrial motion. Both objections were overruled. JA 68, 70.[6]

Dr. Grigson testified that:

> A. For the most part Mr. Satterwhite was pleasant and was cooperative. There was one area of considerable significance. That was an absence of

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[6] In petitioner's motion for a new trial, defense counsel once again charged that he had no prior notice of Dr. Grigson's examination of his client. JA 40-41.



> any type of guilt feelings. There was times when you would have expected, in view of what was being discussed, you would have expected the person to have shown remorse, regret, shame, embarrassment, some form of guilt. There was absolutely no signs whatsoever of any type of guilt or remorseful feelings.

JA 71. After stating that in his opinion petitioner was competent to stand trial and sane at the time of the offense, Dr. Grigson testified as follows:

> Q. [By the Prosecutor] ... did you form an opinion based upon your examination of Mr. Satterwhite as to whether or not he would be a continuing threat to society by acts of criminal violence?
>
> A. Yes, sir. I formed an opinion with regard to that.
>
> Q. What is your opinion?
>
> A. Yes. It's my opinion that Mr. Satterwhite will present a continuing threat to society by continuing acts of violence.
>
> Q. Is there some type of label or name that you give?
>
> A. They are only interested in

their own self-pleasure and gratification.

They repeatedly break the rules and regulations of the laws. Those are the outstanding characteristics. Just simply a lack of conscience and only interested in what they want.

Q. Are all people under that classification the same degree?

A. No, sir. They are not.

Q. Different degrees?

A. Yes. sir. There are.

Q. How or what type of range do you use?

A. Well, you could use a scale of say 1 to 10 where you would have individuals say at the one level are relatively, mild sociopaths. They only break small rules. Then you could start going up the scale where you have individuals that may be all they will ever do is do burglaries or these type of crimes.

Then as you go up you get into acts of violence, rape, a [sic] assaultive behavior. Then at the top of the scale, say an individual that is a 10, these are individuals that have complete disregard for another human being's life. These are



the people who needlessly take another person's life.

Q. Based upon your examination of Mr. Satterwhite and based upon your expertise in the field of psychiatry, do you have an opinion as to where Mr. Satterwhite fits in that scale?

A. Yes, sir. I do.

Q. What is that opinion?

A. That he would be ten plus. He would be as severe a sociopath as you can be.

Q. Would you consider him to be dangerous then?

A. Absolutely.

Q. Is there any cure or rehabilitation for severe antisocial behavior person [sic]?

A. First, with the regard to cure, it's not an illness so there is no treatment. There is nothing that can be done as far as medicine in psychiatry as far as rehabilitation. There has been no form of rehabilitation that has been successful with an individual when they get to this point in life where if they take another human being's life then there is nothing that can be done to modify or change their behavior.

Q. Of course that would be on the outside. That wouldn't apply in a prison setting, would it?

A. Yes, sir. His behavior will continue regardless where he is, regardless whether he's inside of prison or outside or prison.

JA 72-73.

When asked on cross-examination about the American Psychiatric Association's opposition to his activities and its filing of an amicus curiae brief in the case of Smith v. Estelle,[7] Dr. Grigson replied as follows:

> Now, you are talking about the group that said homosexuality is normal and they are opposed to the Death Penalty. Now, this same group is also opposed to my testifying like this here today.

Q. So, you are not implying those people are abnormal that would take a stands [sic] against you?

A. Oh, I think homosexuality is a sickness.

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7 602 F.2d 694 (5th Cir. 1979).



Q. That is not what I asked you.

A. I'm sorry.

Q. You are not implying that people that take stands against you are abnormal are you?

A. I don't know that anybody has ever taken a stand against me.

JA 76. When pressed as to whether there have been programs in which sociopaths have been cured, the doctor testified:

> With severe sociopaths there are none.

Q. What you are saying, if there is one you haven't heard of it?

A. No, sir. In all the reviews that have been done with regard to your severe sociopaths those people who have disregard for other human beings life [sic], there has been none that have been reported in any way at all successfully.

> Now, it is true that there has been research done with regard to the milder sociopaths. These are individuals that can be helped.

Q. Is that correct?

A. No. The Federal Government has

> been spending millions of dollars for a number of years to try to find something to do with these people.

JA 77.

The defense called no witnesses and introduced no evidence at the penalty trial. On summation, the prosecution relied heavily upon the testimony of its medical experts:

> [Y]our District Attorney's office as a result of what he did to Mary Davis on March 12th, 1979 has this man examined by a person who works for Bexar County, Betty Lou Schroeder. Dr. Betty Lou Schroeder and she finds that this man has an antisocial personality disorder. And she tells you under oath, ladies and gentlemen, based upon her experience, based on her opinion that this man is a continuing threat to our society.
>
> The District Attorney's office seeks another opinion. Doctor James Grigson, Dallas psychiatrist and medical doctor. And he tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite.



SF 2725-26. The defense on summation argued the theory that Sharon Bell, deemed a non-credible witness by Dr. Schroeder, was the individual who actually killed the victim. The jury was reminded that it had been instructed on the Texas law of parties, and told that if petitioner had been convicted on this basis he should be deemed less culpable for purposes of punishment. Defense counsel noted that the most gruesome testimony about the killing came from Sharon Bell, the prosecution's star witness at the guilt trial, whose veracity had been questioned at the penalty trial by Dr. Schroeder. SF 2729-37.

**The Appeal**

The Texas Court of Criminal Appeals heard oral argument on April 22, 1981,

but did not decide the appeal until nearly 5-1/2 years later. In an opinion issued on September 17, 1986, the Court held that Sixth Amendment error had been committed under Estelle v. Smith, 451 U.S. 454 (1981):

> As in Estelle v. Smith, appellant had already been indicted when this [Dr. Grigson's] examination took place. Thus, his right to assistance of counsel had attached. Kirby v. Illinois, supra [406 U.S. 682 (1972)]. While the attachment of that right does not mean that appellant had a constitutional right to have counsel actually present during the examination, Estelle v. Smith, supra, it does mean that appellant's attorneys should have been informed that an examination, which would encompass the issue of future dangerousness, was to take place. Additionally, the attachment of this right meant that appellant could have consulted with his attorney prior to the examination. There is nothing to indicate that appellant gave a knowing, intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record. We, therefore, conclude that Dr. Grigson's testimony was improperly admitted into evidence in violation of appellant's Sixth Amendment right to assistance of



> counsel.

JA 97; 726 S.W.2d at 92-93. However, the majority believed that the Smith error had been rendered harmless by the combination of (i) the prosecution's non-expert testimony at the penalty trial, (ii) Dr. Schroeder's testimony, which was the subject of neither a contemporaneous trial objection nor a ground of error on appeal, and (iii) the details of the crime, as recounted by Sharon Bell. JA 97-99; 726 S.W.2d at 93.

Judge Clinton's dissenting opinion challenged the harmless error holding:

> The ubiquitous James P. Grigson, M.D., testified in his own inimitable fashion, now well known to every experienced practitioner in capital cases. To find that "in light of other evidence presented," admitting his expert opinion on what is literally a matter of life or death does not amount to reversible error is startling.

JA 103; 726 S.W.2d at 95.

> [T]he jury's answer to special issue

> two patently is based in part at least on testimony of Dr. Grigson, bolstered by argument of the prosecutor reminding jurors that Dr. Grigson is a "Dallas psychiatrist and medical doctor [as compared to a mere psychologist employed by Bexar County]" and then recounting that "Dr. Grigson ... tells you that on a range from 1 to 10 [appellant is] a ten plus," following that with an iteration of terms Dr. Grigson can explicate so expertly to jurors.

JA 104; 726 S.W. 2d at 96 (brackets in original).

In their certiorari petition, petitioner's trial attorneys once again challenged the admissibility of Dr. Grigson's testimony. The Questions Presented omit any mention of Dr. Schroeder's testimony, although in the body of the petition counsel argued that they did object to the psychologist's testimony "on numerous occasions." Cert. pet. at 10. The Texas Attorney General's office, appearing in the case for the



first time,[8] filed a brief in opposition which did not defend the harmless error holding of the Court of Criminal Appeals. The brief instead argued (pp. 8-10), contrary to both the majority opinion and Judge Clinton's dissent, that no Smith error had occurred. This Court granted certiorari on June 1, 1987.

## SUMMARY OF ARGUMENT

I. The admission of Dr. Grigson's testimony constituted an obvious violation of petitioner's Sixth Amendment rights under this Court's unanimous decision in Estelle v. Smith, 451 U.S. 454 (1981). The State has sought to distinguish petitioner's case from Smith rather than defend the harmless error holding below, but this argument is

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[8] The Bexar County District Attorney's office represented the State before the Texas Court of Criminal Appeals.

unsupported by the record. The Sixth Amendment violation here is even more flagrant than in Smith.

II. Given the broad range of discretion accorded Texas capital sentencing juries and the relatively unstructured nature of their inquiry, the Court should not assume that unconstitutionally admitted evidence which may have contributed to a death verdict was harmless beyond a reasonable doubt. The prosecution's case for death was far more convincing with Dr. Grigson's testimony than it would have been without him. Dr. Grigson's reputation as an exceedingly persuasive expert witness has been widely reported and is no secret to this Court. There is more than a reasonable possibility that his testimony contributed significantly to the death verdict in this case.



## ARGUMENT

### I

### THE ADMISSION OF THE TESTIMONY OF DR. JAMES P. GRIGSON AT PETITIONER'S PENALTY TRIAL VIOLATED HIS SIXTH AMENDMENT RIGHTS UNDER ESTELLE V. SMITH, 451 U.S. 454 (1981)

#### A

In Estelle v. Smith, 451 U.S. 454 (1981), this Court dealt with a Texas prosecutor's use of the very same sort of psychiatric testimony used in this case to secure a sentence of death. Indicted on capital charges, Smith was visited in the Dallas County Jail by Dr. Grigson without notice to defense counsel. Smith was thus deprived of the advice of counsel in determining whether to speak to the doctor. He allowed Dr. Grigson to examine him; the prosecution subsequently called Grigson at Smith's penalty trial; and Grigson testified, based upon the

examination, that Smith was a dangerous sociopath who was certain to commit future criminal acts of violence. Smith was sentenced to die.

This Court unanimously invalidated the death sentence. Finding that Smith had been made the "'deluded instrument' of his own execution," 451 U.S. at 462, the Court held that the Sixth Amendment forbade the Texas practice of utilizing an accused's uncounseled post-indictment interviews with psychiatrists to meet the State's burden of proving probable future dangerousness (Tex. Code Crim. Pro. Art. 37.071 (b) (2)) at the penalty phase of capital trials. The Court's rationale bears repeating here, because it fits equally well what the State of Texas and Dr. Grigson did to John T. Satterwhite, and explains why it was fundamentally unjust.



Here, as in Smith, Grigson's role was "essentially like that of an agent of the State." 451 U.S. at 467. Petitioner's "Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him ... and their interview proved to be a 'critical stage' of the aggregate proceedings ... See Coleman v. Alabama, 399 U.S. 1, 7-10 (1970) (plurality opinion); Powell v. Alabama, supra, [287 U.S.] at 57 [1932]." Id. at 470. Defense counsel was not notified that Grigson would be attempting to interview petitioner, and petitioner was therefore "denied the assistance of his attorney[] in making the significant decision of whether to submit to the examination," id. at 471.[9]

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[9] See also Massiah v. United States, 377 U.S. 201 (1964), relied upon in Smith at 470 (opinion of the Court), 474 (concurring opinion of Justice

(continued...)

As this Court observed in Smith, quoting the Fifth Circuit's opinion:

> [T]he decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult ... even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." Powell v. Alabama, supra, at 69.

Id. at 471.[10]

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[9](...continued)
Stewart, joined by Justice Powell), and 474-75 (concurring opinion of Justice Rehnquist); United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton, ___ U.S. ___, 88 L.Ed.2d 481 (1985).

[10] See also Smith v. Estelle, supra, 602 F.2d at 708: "Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state." Id. at 708-09: "For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who
(continued...)



In one sense, this case is even more egregious than Smith. There, Dr.Grigson's examination had at least been authorized by the trial court, to satisfy the court that Smith was competent to stand trial. 451 U.S. at 456-57 & n.1. Here the record contains no court order authorizing Grigson to interview petitioner for any reason. JA 97; 726 S.W.2d at 92.

**B**

The State's brief in opposition to certiorari, instead of defending the harmless error holding below, argued that no Smith error occurred. The argument is specious.

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[10](...continued)
may find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision."

The Attorney General suggests that the prosecutor's motions of March 16 and April 17, 1979, seeking examinations of petitioner's competency, sanity and probable future dangerousness (JA 3-4, 12-13), were sufficient to notify defense counsel that the State "intended to determine whether there was any psychiatric evidence to support the future dangerousness issue" (brief in opp. at 9). The Attorney General also argues that petitioner waived his Sixth Amendment rights (id. at 10). However, these contentions ignore the relevant facts of record: (i) The motion of March 16 was filed nearly a month before petitioner had any defense counsel (JA 7-8). (ii) The motion of April 17 bears no proof of service upon defense counsel (JA 12-13, SF 22). (iii) Neither the trial court's order of March 16, 1979 appointing Dr.



Schroeder, nor its order of April 18, 1979 appointing Doctors Holbrook and Schroeder, provides that the examinations are to encompass probable future dangerousness (JA 5, 14). (iv) Neither the orders themselves nor anything else in the record establishes that defense counsel received copies of the orders. (v) None of the motions or orders contain any mention of Dr. James P. Grigson. (vi) Defense counsel asserted without contradiction that he had no advance notice of Grigson's examination (JA 17, 40-41). (vii) And nowhere in Grigson's testimony is there any indication that he warned petitioner of the right to consult with counsel prior to deciding whether to submit to the examination (JA 60-61, 69-70).[11]

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[11] According to Dr. Grigson, his warnings were based upon the federal (continued...)

Under these circumstances, the Texas Court of Criminal Appeals correctly determined that Dr. Grigson's testimony violated petitioner's Sixth Amendment rights and that petitioner may not be presumed to have waived those rights. JA 97; 726 S.W. 2d at 92. As this Court noted in Smith itself, "[w]aivers of the assistance of counsel ... 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege.'" 451 U.S. at 471 n. 16, quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981). There is nothing in this

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11(...continued)
district court decision in Smith. JA 60, 69. But that decision "overlooked the role that an attorney might have played in helping a client like Smith decide whether he wished to submit to an examination." Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979). The Fifth Circuit's modification of the district court ruling was not issued until four months after Dr. Grigson interviewed petitioner.



record to establish a waiver meeting that standard.[12]

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12 The Texas Court of Criminal Appeals held that Dr. Grigson's warnings to petitioner were sufficient to satisfy his Fifth Amendment rights under Smith (451 U.S. at 461-69). JA 100; 726 S.W.2d at 94. We have some doubt as to whether the record supports this holding. See p. 23, supra. However, in light of the manifest Sixth Amendment Smith error present here, it is unnecessary to reach this question.

## II

## THE VIOLATION OF PETITIONER'S RIGHTS UNDER SMITH MAY NOT BE DEEMED HARMLESS ERROR

### A

In Chapman v. California, 386 U.S. 18, 24 (1967), this Court ruled that a constitutional violation may be deemed harmless only if it was "harmless beyond a reasonable doubt." The Court has repeatedly adhered to the Chapman standard in recent cases. See Rose v. Clark, ___ U.S. ___, 92 L.Ed.2d 460, 469 (1986), and cases cited therein; Delaware v. Van Arsdall, ___ U.S. ___, 89 L.Ed.2d 674, 684 (1986); United States v. Lane, ___ U.S. ___, 88 L.Ed.2d 814, 823-824 n.9 (1986). Pursuant to this standard, petitioner's death sentence must be invalidated unless the Court is satisfied beyond a reasonable doubt that Dr. Grigson's testimony was "so unimportant



and insignificant that ... [it] may, consistent with the Federal Constitution, be deemed harmless." Chapman v. California, supra, 386 U.S. at 22. In the words of Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), quoted in Chapman (id. at 23), "[w]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been ... [sentenced to death] without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the ... [death sentence]."

Because the jury's sentencing decision in a Texas capital case is considerably less structured than its determination of guilt, the capacity of an appellate court to assess what the jury would have done in the absence of the tainted evidence is correspondingly

restricted. The Texas capital sentencing process "is not an exact science, and the jurors ... unavoidably exercise a range of judgment and discretion." Adams v. Texas, 448 U.S. 38, 46 (1980). There is no objective, normative marker available to say what portions of the evidence they may have regarded as "overwhelming." California v. Ramos, 463 U.S. 992, 1007-1009 (1983). For this reason, the harmlessness of constitutional error at petitioner's capital sentencing proceeding should be determined solely by asking whether the evidence might have contributed to the jury's decision. No more demanding standard would take adequate account of "the range of discretion entrusted to a jury in a capital sentencing hearing," Turner v. Murray, ___ U.S. ___, 90 L.Ed.2d 27, 35 (1986), and the qualitative difference



between death and other forms of punishment, entailing a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (plurality opinion); id. at 363-364 (concurring opinion of Justice White).

Until the decision below, no appellate court had ever found a Smith error harmless. In its only prior decision considering such a harmless error claim, the Texas Court of Criminal Appeals stated the correct standard and reached the correct result:

> the issue we must confront is ... whether the testimony of Coons [the prosecution's psychiatrist] might have contributed to the jury's verdict during the punishment phase. We conclude that there was a

> reasonable possibility that Coons' testimony might have contributed to the jury's verdict during the punishment phase of appellant's trial.

Clark v. State, 627 S.W.2d 693, 698 (Tex. Crim. App. 1981).[13] The Fifth Circuit has considered the issue on five occasions, and each time has rejected the prosecution's harmless error contention. Muniz v. Procunier, 760 F.2d 588 (5th Cir. 1985), cert. denied, ___ U.S. ___, 88 L.Ed. 2d 274 (1985); White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983); Green v. Estelle, 706 F.2d 148 (5th Cir. 1983), rehearing denied with opinion, 712 F.2d 995 (5th Cir. 1983); Gholson v. Estelle, 675 F.2d 734, 745 (5th Cir. 1982) (con-

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[13] In Powell v. State, ___ S.W.2d __, No. 67,630 (Tex. Crim. App. July 8, 1987) (argued May 27, 1981), the Court of Criminal Appeals rejected a Smith claim on the merits (slip op. at 6-12) and then added a brief passage of dicta commenting that even if error had existed it would be harmless (id. at 12-13).



curring opinion); Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981).[14]

**B**

Analysis of the prosecution's other evidence on the issue of punishment in this case reveals no basis for a determination that Dr. Grigson's testimony was harmless beyond a reasonable doubt.

Although the accomplice testimony of Sharon Bell described a brutal crime,

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[14] Amicus was either counsel of record, amicus or a consultant in all five cases. Although harmless error is mentioned only in the White and Gholson opinions, a review of the Fifth Circuit briefs will leave no doubt that the Court necessarily considered and rejected harmless error claims in each case.

As a practical matter, virtually every Texas death-sentenced prisoner who has a Smith claim has already won his case. See Muniz brief in opposition to certiorari (No. 85-151) at 6-7 and Appendix C. Unless there are other cases tried prior to Smith that have remained pending in the Texas Court of Criminal Appeals longer than this one and Powell, this Court is not likely to see the issue again.

there is no warrant in the record to assume that the details of her account--and especially her description of petitioner's role -- were necessarily believed by the jury or contributed significantly to the penalty verdict. Bell had previously been convicted of murder, was facing two capital murder charges and one aggravated robbery charge, and had been promised that in return for her testimony against petitioner she would not be sentenced to die. She had numerous prior mental hospital commitments. She lied on the witness stand about the deal she had struck with the prosecutors in this case. She at first told the arresting officer that the gun used to kill the victim was hers, and even gave a sworn statement to that effect before changing her story. The gun was closest to her at the time of



arrest, and it was she who made threatening movements while the arresting officer searched the vehicle. And her physical size belies any suggestion that she lacked the capacity to be either an equal or dominant participant in the robbery-murder.

In short, while the jury found that petitioner was sufficiently involved in the crime to merit conviction, it may well have done so on the theory submitted in the court's instructions, under which Bell could have been the actual killer. In any event, there is no reason to assume that Bell's account of the offense was accepted as a whole or contributed significantly to the jury's assessment of petitioner's probable future dangerousness.

Eight police officers testified in conclusory fashion that petitioner's

reputation for being a peaceable and law-abiding citizen was "bad." Given the fact that petitioner did have a criminal record, this testimony could hardly have come as a surprise to the jury. However, one cannot plausibly assume that a record consisting of two probated sentences, a 30-day jail term, and one burglary conviction for which petitioner served two years in prison -- followed by five years with no further criminal convictions prior to the present one--sufficiently convinced the jury that petitioner deserved to die. The shooting episode described by petitioner's mother's ex-husband (i) was not shown to have resulted in a criminal complaint or conviction, and (ii) occurred during a family argument in which the witness concededly threatened to cut petitioner with a knife (SF 2668). And while one of



the police reputation witnesses also testified to petitioner's possession of a gun at the time of an arrest, the prosecution adduced no evidence that petitioner was guilty of any crime in that connection.

This leaves the testimony of psychologist Betty Lou Schroeder, the prosecution's other expert, as the principal basis for a claim that Dr. Grigson's opinions were harmless. In considering the effect of this testimony, the Court should bear in mind that it was admitted in patent violation of Estelle v. Smith and should never have reached the jury's ears in the first place. The warnings that Schroeder gave petitioner on March 16, 1979 did not include advice that her answers "could be used to produce evidence against him at the penalty phase," and were plainly insufficient to

satisfy the Fifth Amendment requirements of Smith. See Ex parte Demouchette, 633 S.W.2d 879, 880-81 (Tex. Crim. App. 1982).[15] In addition, her diagnosis was based in part on subsequent uncounseled testing and observations which took place without any warnings at all, long after counsel had been appointed. JA 54, 57. The court below recites that petitioner's counsel "did not object to Dr. Schroeder's testimony at trial and does not complain of its admission on appeal," J.A. 98; 726 S.W.2d at 93 (emphasis in original), but fails to note that, as a matter of state law, no contemporaneous trial objection to Smith error is required in cases tried prior to this

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[15]As this Court held in Smith, petitioner should have been advised that the examination "would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death." 451 U.S. at 467.



Court's Smith decision.[16]

In any event, a fair reading of Dr. Schroeder's testimony together with Dr. Grigson's should leave this Court unconvinced that Dr. Grigson's was harmless beyond a reasonable doubt. Dr. Grigson's testimony was far more thorough, complete and self-assured. While the psychologist's testimony at least conceded that the credibility of Sharon Bell was dubious, Dr. Grigson was an unwavering

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[16]Ex parte Chambers, 688 S.W.2d 483, 484 (Tex. Crim. App. 1984), and cases cited therein; id. at 486 (concurring opinion joined by a majority of the Court). See also Muniz v. Procunier, 760 F.2d 588 (5th Cir. 1985), cert. denied, ___ U.S. ____, 88 L.Ed.2d 274 (1985) and Green v. Estelle, 706 F.2d 148, rehearing denied with opinion, 712 F.2d 995 (5th Cir. 1983), both holding that Texas has no contemporaneous objection rule with respect to cases tried prior to Smith. Had an attack upon Dr. Schroeder's testimony been included in the brief on appeal (or in a supplemental brief filed during the 5-1/2 years the case was pending on appeal), Texas law would have required consideration of the claim.

advocate for the prosecution. He cloaked his testimony in medical terminology which could not fail to impress the jury with his knowledge and expertise.

C

Beyond a reading of the cold record of this case, however, there are additional facts concerning Dr. Grigson which this Court is entitled to notice judicially. Since this is the third Texas capital case involving Dr. Grigson to be heard by the Court,[17] and his testimony has been summarized in countless certiorari petitions as well, the Court has more than a passing familiarity with this particular expert witness. However, the sheer multitude of his appearances does not tell the entire story. Equally remarkable is his success rate in capital

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17 Estelle v. Smith, supra; Barefoot v. Estelle, 463 U.S. 880 (1983).



cases, brought about not so much by the scientific accuracy of his testimony[18] as by the extraordinary skill with which it is delivered to the jury.

As of November 1980, Dr. Grigson had already testified for the prosecution "in about 60 murder sentencing hearings, and in all but one of those the death penalty was imposed." National Law Journal, Nov. 24, 1980, pp. 1, 8. A Dallas Times-Herald article of September 30, 1979, p.1, stated that there had been 22 capital murder trials in Dallas County as of then. "Grigson testified for the prosecution in every case. Only one defendant escaped death row."

The National Law Journal found Dr. Grigson's testimony "devastating." "His

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18 The American Psychiatric Association filed amicus curiae briefs in both Smith and Barefoot attacking the reliability of Dr. Grigson's testimony.

professional demeanor and self-assurance create a formidable barrier for defense lawyers." The doctor was described as speaking to juries in "a folksy but professional manner," projecting the "gentle demeanor of Marcus Welby."

An American Lawyer article of the same period (November 1979), pp. 25-26, found Dr. Grigson's manner "folksy and relaxed," without any "ambiguity or subtle distinction. He addresses the jury in plain, non-technical language." His answers are "direct, definitive and uncompromising." Dr. Grigson himself told the American Lawyer: "I've been on the witness stand a lot of times, and I've been asked every question you can think of. I know what I'm doing." The article reported that "[m]ost attorneys treat Grigson with kid gloves, knowing that if he is pushed too hard on cross-





examination, he can damage a defendant even further. ('A lot of them are afraid of me', says Grigson, half-smiling.)"

A June 1980 feature in D Magazine, a Dallas monthly, found Dr. Grigson to be "the epitome of southern charm" (p. 167) and reported that "he has turned expert testimony into an art and a business in a way no other professional ever has." (p. 168). The article described Dr. Grigson's appearances of the period as follows:

> His testimony was generally devastating. Jurors otherwise tentative about bringing the hammer down on a defendant found Grigson's testimony about dangerousness a convenient handle to grasp in making their deliberation; fact issues might remain in dispute and circumstantial evidence could remain cloudy, but Jim Grigson's testimony was always crystal clear. Defense attorneys, generally lacking in psychiatric expertise, found it impossible to cross-examine effectively or impeach the smooth-talking doctor with the terrific smile. "We learned a way to deal with him, all right," recalls one.

"And that was don't."

p. 170.

The Dallas Times-Herald reported that by the time Dr. Grigson finishes his testimony, "the jury seems captivated, as if Grigson has penetrated the invisible fraternal bond and become the 13th juror." As the National Law Journal stated, summarizing the observations of several defense attorneys, "he relieves the jury of the massive burden of decision." One defense lawyer described this effect to the Journal as follows:

> He tells the jury what it wants to hear .... [H]e helps put that barrier between juror and the defendant and he does it with a medical certainty.

Dr. Grigson himself agrees, according to his interview with the American Lawyer: "I think the jurors feels a little better when a psychiatrist says it -- somebody that's supposed to know more than they



know."

Amicus knows of one videotaped rendition of a Grigson performance, a simulated version of his Smith testimony prepared for a 1978 Texas Criminal Defense Lawyers Association conference. If this were a federal habeas corpus proceeding, it could have been introduced in evidence and the Court could see for itself what the articles quoted above are saying. For now, the articles and this Court's own reading of numerous Grigson transcripts will have to suffice. This man is one of the most devastatingly effective expert witnesses in the history of the American courtroom. To call his testimony "harmless" beyond a reasonable doubt is inconceivable.

## CONCLUSION

The judgment of the Texas Court of Criminal Appeals affirming petitioner's death sentence should be reversed.

Respectfully submitted,

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# APPENDIX

Tex. Code Crim. Pro. Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury.

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute

a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on [or is unable to answer][1] any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

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[1] Material in brackets has been added by amendment subsequent to petitioner's trial



[(f) If a defendant is convicted of an offense under Section 19.03(a) (6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.]

[(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.]

[(h)] The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

# AMICUS CURIAE

# BRIEF

NO. 86-6284

In The

# Supreme Court of the United States

October Term, 1986

JOHN T. SATTERWHITE,

*Petitioner,*

*vs.*

THE STATE OF TEXAS,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS**

## MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF AMICUS CURIAE OF THE COALITION FOR THE FUNDAMENTAL RIGHTS AND EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER

J. Benedict Centifanti, Law Clerk
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## Motion to File Brief Amicus Curiae Out of Time by the Coalition for the Fundamental Rights and Equality of Ex-Patients in Support of Petitioner

The Coalition for the Fundamental Rights and Equality of Ex-patients ("Coalition for the FREE") respectfully submits this motion to request permission to file its proposed brief amicus curiae out of time.

Counsel for the petitioner have consented to the filing of this Motion and the related Brief amicus curiae and their consent will be filed with the Court. Counsel for the State has declined to consent.

The Coalition seeks this leave to file out of time due to a combination of circumstances. Beginning shortly after this petition for certiorari in this case

was granted by this Court, counsel for the Coalition made reasonable efforts to contact counsel for petitioner by telephone. Due to conflicting summer schedules and other commitments of counsel, final arrangements for consents and due dates were not concluded until the week of July 20, 1987. Acting in good faith, counsel for the Coalition mistakenly relied on a proposed extended filing date of July 28, 1987. Counsel only became aware of the actual filing date of July 24, 1987 after contacting counsel for the State on Monday, July 27, 1987.

The Coalition seeks this Court's pemission to file late in this case because of the particular interest of its members in this matter. The organizational members of the Coalition

for the Fundamental Rights and Equality of Ex-patients [1/] (hereinafter the "Coalition for the FREE") are all groups whose primary interests and activities concern the promotion of public understanding of mental health issues and the protection of the rights of the mentally ill and of present and former mental patients. Members and clients of these organizations include many former patients, their families and friends, as well as advocates for the mentally ill.

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1/ The participants in the Coalition for the FREE are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION; NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION; SHARE OF DAYTONA BEACH, FLORIDA, INC.; THE MENTAL PATIENT'S ASSOCIATION OF NEW JERSEY; MISSOURI MENTAL HEALTH CONSUMERS' ASSOCIATION; THE MONTANA MENTAL HEALTH CONSUMERS ADVOCACY PROJECT; and THE MENTAL PATIENTS' ASSOCIATION OF PHIADELPHIA

(A more complete description of the members of the Coalition is included at page 1 of the Brief amicus curiae attached hereto).

In this case, the Court will hear arguments specifically on the applicability of the Fifth Amendment to psychiatric interviews and on the effectiveness of waiver of Miranda rights. Many of the members of the Coalition--and/or clients of members--have been involved in court proceedings which implicated these or closely-related questions. Whatever this Court decides in this case will undoubtedly affect the outcome of similar cases in the future and will also likely impact on all proceedings involving the criminal law, psychiatric testimony and Miranda rights, including cases in the state courts.[3/] Therefore, amici curiae now wish to share their specialized knowledge and insights with this Court and the parties in this case.

Amici curiae believe that no other party or amici here will make available to the Court these arguments regarding the proper role of psychiatric testimony, Miranda rights and waiver, the right to counsel in these contexts, and the current research and commentary on these issues. Because of their demonstrated concern about the proper uses of psychiatric testimony and their involvement in similar proceedings, amici curiae believe that they have a clear interest in this case, and can offer a significant alternate viewpoint on these issues to this Court.

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## Question Presented

Was petitioner denied effective assistance of counsel, a fair and impartial trial, equal protection of the law, due process of law and his right to be free from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the Trial Court allowed witness, James Grigson, M.D. to testify to evidence obtained in violation of Article I, Section 10 of the Texas Constitution and in violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States?

TABLE OF CONTENTS

## TABLE OF CASES

**Statutes**



**Other Authorities**

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

This brief amicus curiae is being filed in support of the Petitioner. Counsel for the petitioner have consented to the filing of this Brief and their consent will be filed with the Court. Counsel for the State has declined to consent.

Amici curiae, the organizational members of the Coalition for the Fundamental Rights and Equality of Ex-patients [1/] (hereinafter the "Coalition for the FREE") are all groups

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1/ The participants in the Coalition for the FREE are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a

whose primary interests and activities concern the promotion of public understanding of mental health issues and

(footnote continued)

network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

## NATIONAL MENTAL HEALTH CONSUMERS' ASSOCIATION

The National Mental Health Consumers' Association was organized in Baltimore, Maryland in June, 1985, as a national representative voice for mental health consumers and charged with developing national forums so that the concerns of mental health consumers can be heard.

## SHARE OF DAYTONA BEACH, FLORIDA, INC.

SHARE of Daytona Beach, Florida, Inc., organized in Daytona Beach in January, 1980, was incorporated in November, 1985 as a non-profit corporation in the State of Florida. SHARE's primary thrust is the rights of mental patients and former mental patients.

the protection of the rights of the mentally ill and of present and former mental patients. Members and clients of

(footnote continued)

THE MENTAL PATIENT'S ASSOCIATION OF NEW JERSEY

The Mental Patient's Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

MISSOURI MENTAL HEALTH CONSUMERS' ASSOCIATION

The Missouri Mental Health Consumers' Association was formed by former mental patients in St. Louis in 1986 in order to promote the rights and interests of mental health consumers in Missouri. One of the principal interests of MMHCA is in affecting public policy decisions involving mental health issues from the consumer perspective.

THE MONTANA MENTAL HEALTH CONSUMERS' ADVOCACY PROJECT

The Montana Mental Health Consumers' Advocacy Project, an unincorporated association formed in November, 1983, in Billings, Montana, is an ex-mental patient self-help and political action group, organized for the purposes of fighting discrimination and stigma and influencing legislation for the rights of mental patients.

these organizations include many former patients, their families and friends, as well as advocates for the mentally ill.

This case, like others in which the Coalition and/or its members have filed recent amicus briefs in this Court, involves issues of the relationship between the mental health field and the legal system, specifically here concerning the proper role and activities of psychiatrists in the area of criminal law.[2/]

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(footnote continued)

THE MENTAL PATIENTS' ASSOCIATION OF PHIADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discriination against the psychiatrically disabled in any form.

[2/] The Coalition for the FREE and/or its members have filed amicus briefs in several recent cases before this Court. See, e.g., the Coalition's amici briefs in United States Department

In this case, the Court will hear arguments specifically on the applicability of the Fifth Amendment to psychiatric interviews and on the effectiveness of waiver of Miranda rights. Many of the members of the Coalition--and/or clients of members--have been involved in court proceedings which implicated these or closely-related questions. Whatever this Court decides in this case will undoubtedly affect the outcome of similar cases in the future and will also likely impact on all proceedings involving the criminal law, psychiatric testimony and Miranda rights, including cases in the state courts.[3/] Therefore, amici

(footnote continued)

of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto, 106 S. Ct. 2683 (1986) and Colorado v. Connelly, 107 S. Ct. 515 (1986).

3/ This Court's recent caseload reflects the increasing concern about these and related issues. See, in

curiae now wish to share their specialized knowledge and insights with this Court and the parties in this case.

Amici curiae believe that no other party or amici in this case will make available to the Court these arguments regarding the proper role of psychiatric testimony, Miranda rights and waiver, the

(footnote continued)
addition to this case, Colorado v. Connelly, 107 S.Ct. 515 (1986); Smith v. Murray, 106 S.Ct. 2661 (1986); Allen v. Illinois, 106 S.Ct. 2988 (1986); and Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1007, 84 L.Ed. 2d 53 (1985). Smith v. Murray, above, in particular, clearly foreshadowed this case. See Smith v. Murray, 106 S.Ct. at 2664 regarding the absence of any warnings as required under Estelle v. Smith, 451 U.S. 454 (1981). In addition to these cases, there is one other development in this area of the law which may also be currently influencing the role of psychiatry in this context: The Insanity Defense Reform Act of 1984, Pub. L. No. 98-472, 98 Stat. 2057 (1984). See, e.g., Note "Ake v. Oklahoma: An Interloper in the Brave New World of the 1984 Insanity Defense Reform Act Challenges Federal Rule of Evidence 704(b)" 55 Miss. L.J. 287, 315 (1985). See also, Carroll, "Insanity Defense Reform," 114 Mil. L. R. 183 (1986)

right to counsel in these contexts, and the current research and commentary on these issues. Because of their demonstrated concern about the proper uses of psychiatric testimony and their involvement in similar proceedings, amici curiae believe that they have a clear interest in this case, and can offer a significant alternate viewpoint on these issues to this Court.

## II. SUMMARY OF ARGUMENT

The ruling below in this case by the Texas Court of Criminal Appeals is inconsistent with this Court's decision in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981) because petitioner was not given an adequate warning about the specific purposes for the psychiatric interview either by the expert witnesss or by having the assistance of his counsel with notice in advance of the interview. The potential use of the psychiatric testimony in the capital sentencing phase of his criminal proceedings had to be expressly stated to petitioner by the expert in order to satisfy both Estelle and Miranda v. Arizona, 348 U.S.436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). (Pt. III A) Notwithstanding the allegedly

unobjected-to testimony of another expert, the failure to notify petitioner's counsel in advance of the interview by Dr. Grigson violated petitioner's Sixth Amendment right to effective assistance of counsel, especially given the professional background and experience of this particular expert and the ambiguous and contradictory warning given petitioner by that expert alone. (Pt. III B.)

## III. ARGUMENT

### A. The Decision Below Is Inconsistent with Estelle v. Smith, 451 U.S. 454 (1981) Because Petitioner Was Not Adequately Warned Regarding the Possible Use of the Psychiatric Interview In Sentencing Proceedings

In Estelle v. Smith, 451 U.S. 454 (1981) this court has already definitively established guidelines for

permitting the use--and prohibiting the abuses--of psychiatric testimony such as that involved in this case.[4/] In that case, this court stated:

> Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to

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4/There should be no question about amicus' longstanding opposition to the use of such psychiatric testimony in the first instance because of the well-known fallibility of psychiatric predictions of dangerousness. See, e.g., the Brief amicus curiae of the Coalition for the Free in United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto, above at p. 14 regarding the "false positive rates of experts' predictions of dangerousness." See also, Brief amicus curiae for the American Psychiatric Association in Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed. 2d 1090 (1983) at p. 12: "The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the [psychiatric] profession," citing numerous studies in support thereof at p. 13, n. 8.

> establish his future dangerousness. If, upon being adequately warned, respondent had intimated he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examination are not frustrated but the State must make its case on future dangerousness in some other way.
>
> Estelle v. Smith 451 U.S. above at 468-69 (emphasis added)

Here, however, there clearly was no such "adequate" warning to petitioner by anyone of the "possible use" of the psychiatric interview in the sentencing phase. Indeed, here petitioner was positively misled about its possible use by Dr. Grigson's remarks that the interview "could be harmful or it could be helpful depending upon what the findings would be." Satterwhite v. State of Texas, No. 67, 220, slip opinion (Texas Ct. of Crim. App., Sept. 17,

1986), at p. 25. (hereinafter "Opinion"). Interestingly, the lower court in Estelle had foreseen this approach in that opinion where no warnings had been given:

> If the state is entitled to compel a defendant to submit to an examination, it can, in an effort to gain the defendant's cooperation, mislead him or indeed lie to him about the significance of the examination; it can take advantage of his ignorance or lack of understanding. It can coerce him in any way that does not make his statements less useful to the interrogating psychiatrist. Psychological pressure, sharp practices, and deceit are likely to be, in effect, the means of compelling examinations. These tactics are inherently discriminatory. Smith v. Estelle, 602 F.2d 694, 707-8 (5th Cir. 1979).

Similarly, in Moran v. Burbine, 106 S. Ct. 1135, at 1158, (1986) Justice Stevens' dissenting opinion notes as follows:

> In this case it would be perfectly clear that Burbine's waiver was invalid if, for example, Detective Ferranti had "treatened, tricked, or cajoled" Burbine in their private

> pre-confession meeting--perhaps by misdescribing the statements obtained from DiOrio and Sparks--even though, under the Court's truncated analysis of the issue, Burbine fully understood his rights. Petitioner's case here is even more clear regarding the misleading nature of the warnings given to him.

Because of these concerns, as others have commented,[5/] the Court's decision in Estelle would seem to require--as a bare minimum--a specific disclosure about the possible use of the interview at sentencing.

Yet here, even the State's own examination shows that Dr. Grigson's "warning" fails to meet that standard.

> Q. And prior to the examination did you given [sic] any type of admonitions to him in the way of warnings?

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5/ See e.g., White, "Waiver and the Death Penalty: The Implications of Estelle v. Smith," 72 J. of Crim. L. & Criminol. 1522, 1534-37 (1981) (hereinafter "White"); and Slobogin, "Dangerousness and Expertise," 133 U.Pa.L.R. 97, 167 (1984) (hereinafter "Slobogin").

> A. Yes, sir. I did. I explained to him on both occasions the purposes of the examination in terms of the three questions, that I was primarily doing the evaluation in order to determine the question of competency, the question of sanity or insanity and the question of whether or not he presented a continuing threat to society, whether or not there was a question as to propensity of violence, dangerousness. Respondent's Brief in Opposition, pp. 5-6 (hereinafter "RBO")

Dr. Grigson then went on to tell petitioner about a federal judge's decision that permitted defendants to decline to be interviewed. (Id.) Clearly, all of this highly technical language and disclosure is rendered totally meaningless without one's being given the context of the "possible use" of this evidence at sentencing.

As then Chief Justice Burger noted in Estelle concerning the parallel issue of the right to counsel regarding this context:

> ...(R)espondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.
>
> Estelle v. Smith, 451 U.S. above, at 471 (emphasis added)

In petitioner's case, the failure to notify counsel about the interview--in addition to raising the Sixth Amendment issues discussed below--further underscores the lack of "adequate warning" given here regarding its "possible use". The defendant in a capital case needs to know what is really at issue before he can properly evaluate whether or not to waive his right to decline to give permission for a psychiatric interview that indeed "could be harmful or...could be helpful" to his very life.[6/] There can be no effective waiver of Miranda rights where the defendant's interests are not

"red-flagged" in a more candid manner than Dr. Grigson's approach did here. Recently in Moran v. Burbine, 106 S.Ct. above, at 1141 (1986) this Court expressed the standards for waiver in this way:

> [T]he waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. (emphasis added)

Clearly, petitioner here did not have such a "full awareness" of the "consequences" of waiving his right not to be interviewed in this context.

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6/ See White, n. 5 above, at 1537: "If the defendant's statement is to be used against him in the penalty phase of a capital trial, then knowledge that the statement may be used for this purpose should be essential to a valid waiver under Miranda. A capital defendant who lacks such knowledge will not be aware of the true nature of the adversary interests involved." Cf. Ford v. Strickland, 106 S.Ct. 2595 (1986).

An additional factor here is the inherently compulsory nature of interviews in this setting. This Court's decision in Estelle did not over-emphasize the custodial nature of pre-trial psychiatric interviews--and perhaps purposely so.[7/] In the absence of any warning to Smith, or any awareness at all of his rights, the custodial atmosphere in Estelle was a marginal issue at best. However, given some "warning" here--however ineffective or inadequate--the coercive atmosphere of the custodial interview again becomes relevant.

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7/ See White, n. 5 above, at 1532: "[T]he Court did not focus upon the potentially coercive atmosphere involved, but rather upon the defendant's lack of awareness of the incriminatory dangers."

For all we know, Satterwhite may have mistakenly thought that his attorney had already approved of this interview because of the earlier one and therefore may have been afraid to "refuse" to follow such non-existent advice.

In its amicus brief in Estelle, the American Psychiatric Associatioon expressed its view using an all-too-prophetic phrase:

> [A] defendant should not be compelled to participate in a psychiatric examination on issues concerning the penalty phase.
>
> It should be emphasized that recognition of a right to refuse participation in psychiatric examinations that could lead to testimony for capital sentencing purposes would not distort the "fair state-individual balance" that underlies the Fifth Amendment privilege.
>
> ...[T]he defendant should not be required to guess that he may refuse to participate in the psychiatric examination.
>
> Brief amicus curiae for the

American Psychiatric Association in Estelle v. Smith above, at pp. 27-28 (emphasis added)

The effectiveness of any "right to refuse" in the area of treatment depends on full disclosure of side-effects as well as potential benefits. Possible life-threatening effects are clearly included in the warnings given in this psychiatric context.[8/] Similarly, here, there can be no effective "right to refuse" without a corresponding specific disclosure of risks and benefits to the defendant, particularly on the potential impact of the psychiatric interview on sentencing in capital cases.

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8/ Cf., on the "right to refuse" and "informed consent" disclosure procedures in psychotropic drugging cases, Anderson v. State, 135 Ariz. 578, 663 P.2d 570 (1980); People v. Medina,--Col. ____, 705 P.2d 961 (1985); Rogers v. Commissioner, 396 Mass. 489, 458 N.E.2d 308 (1983) and Rivers v. Katz, 67 N.Y.2d 483, 504 N.Y.S.2d 74 (Ct. App. 1986).

B. The Failure to Notify Petitioner's Counsel In Advance of Dr. Grigson's Interview Violated the Sixth Amendment's Guarantee of Effective Assistance of Counsel

The court below conceded that the failure to notify petitioner's counsel of Dr. Grigson's interview was error.

> We therefore conclude that Dr. Grigson's testimony was improperly admitted into evidence in violation of appellant's Sixth Amendment right to assistance of counsel.
>
> See Opinion, p. 21.

The court concluded, however, that this error was rendered harmless because of the allegedly unobjected-to admission of Dr. Schroeder's psychological report on the same issue--the dangerousness of petitioner. Opinion, pp. 21-22 [9/] And, for its part, the State now claims that the sequence of the two motions for

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9/ But see, as to this issue, the Petition for Certiorari, p. 10 regarding objections by petitioner's counsel.

interviews and the first actual interview operated altogether as a kind of "constructive" notice to petitioner's counsel who thereby had "reasonable opportunity" to alert petitioner to his "right to refuse" Dr. Grigson's request, or at least to limit the use of the interview. RBO, p. 9. In the first place, this argument clearly fails the standard of Estelle requiring actual notice. Estelle v. Smith, 451 U.S. above at 471.

Moreover, all that really needs to be said about the sequence of these two interviews is that there are obviously great differences in degree(s) and kind between Dr. Grigson and Dr. Schroeder, whatever their testimonial

similarities.[10/] Without unduly belaboring the effects on the jury of their respective medical versus psychological expertise, there can be little question that at least the prosecutor thought the distinction was worth mentioning--and emphasizing--in his summation. See, Petition for Certiorari, at p. 13:

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10/ Earlier in its Brief amicus curiae in Barefoot v. Estelle, 463 U.S. above, at p. 16, the American Psychiatric Association made a similar distinction:

> While adding little, if anything, to the factual evidence concerning the risk of future dangerousness, psychiatric opinions on this subject substantially prejudice the defendant....(P)sychiatric testimony is likely to be given great weight by a jury simply because it is, or purports to be, a statement of professional opinion. A psychiatrist comes into the courtroom wearing a mantle of expertise that inevitably enhances the credibility, and therefore, the impact of the testimony.

See also, Slobogin, n. 5 above, at p. 147, n. 182 as to the effects of such "expert" testimony on judicial decision-making.

> The prosecution argued to the jury reminding them that Dr. Grigson is [a] "Dallas Psychiatrist and Medical Doctor as compared to a mere psychologist employed by Bexar County."] See also, Dissenting Opinion, pp.2-3.

For all we know, even Satterwhite himself may have thought that a psychiatrist's interview was more "scientific" or medically therapeutic than the "mere" psychologist's tests he had already taken and therefore was more willing to be cooperative with Dr. Grigson in the absence of any advice from counsel regarding the dangers of the psychiatric interview in particular.

The real issue here is a very narrow one--can the government do through its psychiatric "agent", Dr. Grigson, what it may not do directly through its attorneys and other investigators? There can be no question as to the nature of the psychiatrist's role here:

> That [defendant] was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, [or] prosecuting attorney is immaterial.
>
> Estelle v. Smith, 451 U.S. at 467. 11/

In addition, here, there also can be little doubt of counsel's likely reaction to notice that Dr. Grigson was going to

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11/ White, n. 5 above, at p. 1533, among others, has also noted this issue:

> "There is no reason to suppose that the defendant in Smith viewed the examining psychiatrist as anything other than a government psychiatrist. Thus, based on its holding, the Court's language could be read to include only people known by defendant to be government agents. (emphasis added.)

conduct an interview of their client for any purpose.[12] Moreover, there can be little doubt that counsel would also react far differently to notice that Dr. Grigson was planning to interview the defendant, as opposed even to any other psychiatrist or psychologist.[13]

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[12] See the Petition for Certiorari, at p. 9:

> ...Dr. James P. Grigson, is well-known to every practitioner in capital cases. It is this very same "expert witness' that has testified in several punishment phases of criminal proceedings in capital cases which has been noted in Smith v. Estelle....

See also, White, n. 5 above, at p. 1544, regarding the relevance of the known "propensities of the particular psychiatrist involved."

[13] Dr. Grigson's "national" reputation in this context is beyond argument. See, e.g., "The Supreme Court, 1980 Term," 95 Harv. L.R. 91, at 123 (1981):

> The state's attorney [in Estelle v. Smith, above] consulted a Dr. Grigson--known in some circles as "the killer shrink" because of his work for prosecutors in

The point here is that within the stricture of their ethical obligation to avoid "professionally unreasonable" conduct, Messrs. Wood and Takas could not possibly have failed to counsel petitioner specifically regarding Dr. Grigson's known propensities had they but

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(footnote continued)

> capital cases....(citing Bloom, "Doctor for the Prosecution", Am. Law. Nov. 1979, at 25).

And, further, at p. 123, n. 9.

> Dr. Grigson's work had induced at least one scholar to conclude that he operated "at the brink of quakery." Dix, "The Death Penalty, 'Dangerousness', Psychiatric Testimony and Professional Ethics," 5 Am. J. Crim. L. 151, 172 (1977). And regarding Dr. Grigson's testimony in Smith, one Texas appellant judge wrote that he was 'unable to find that much of the testimony offered was from this side of the twilight zone.' Id. at 165 (quoting a dissent of Texas Criminal Appeals Judge Odom, which was withdrawn before publication in light of Jurek v. Texas, 428 U.S. 262 (1971) (plurality opinion)

14/

been informed of the interview. See Strickland v. Washington, 466 U.S. 668,

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(footnote continued)

See, for more on the same material, "The Supreme Court, 1982 Term," 97 Harv. L.R. 70, 123 at n. 11 (1983). See also, Perlin, "Dulling the Ake in Barefoot's Achilles Heel," 3 N.Y.L.S. Hum. Rts. Ann. 91, 103 n. 63 (1985); Nethery v. State, 692 S.W.2d 686, 708 (Tex. Ct. Crim. App. 1985) (Dr. Grigson has testified by his own count in 120 capital cases and "in every capital murder case in which he had testified about future dangerousness he had testified in the affirmative,") and Ewing, "'Doctor Death' and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Procedures," 8 Am. J. L. & Med. 407, 410 (1983) (As of 1983, the jury had returned the death sentence in 69 of the 70 capital cases in which Dr. Grigson had testified up to that time.); "They Call Him Dr. Death," Time, June 1, 1981 at 64; and Taylor, "Dallas' Doctor of Doom," Nat'l. L. J., Nov. 24, 1980 at 1 ed. 2.

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Even the American Psychiatric Association has taken pains to distance itself from this particular expert. See, Brief amicus curiae of the A.P.A. in Barefoot v. Estelle, above at p. 24:

> Dr. Grigson also gave his own criteria for determining whether or not someone has an 'antisocial personality disorder.'

691, 104 S.Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984), reh. den. 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed. 2d 864 (1984). See also, United States v. Chronic, 466 U.S. 648, 104 S.Ct. 2039, 75 L.Ed 2d 430 (1984). Nothing that the State now argues regarding "constructive" notice to counsel or reasonable opportunity for counsel to warn petitioner based on the Schroeder interview could possibly excuse petitioner's counsel from their obligation to warn petitioner about the

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(footnote continued)

Further, at p. 24, n. 19:

> In Estelle v. Smith, supra, for example, Dr. Grigson concluded that defendant was "a severe sociopath" even though his only prior criminal conviction had been for possession of marijuana. 101 S.Ct. at 1870, n. 4, 1871.

And finally, at p.25:

> In sum, the inadequate procedures used in this case allow a psychiatrist to masquerade his personal preferences as "medical" views, without providing a meaningful basis for rebutting his conclusions.

reputation of Dr. Grigson in particular had they only been so notified.[15]

Finally, there can be no real question here regarding the petitioner's need for counsel at this "critical stage" of the proceedings. As even the Texas Court of Criminal Appeals conceded:

> As in Estelle v. Smith, appellant had already been indicted when this examination took place. Thus, his right to assistance of counsel had attached. Kirby v. Illinois, supra. While attachment of that right does not mean that appellant had a constitutional right to have counsel actually present during examination, Estelle v. Smith, supra, it does mean that appellant's attorneys should have been informed that an examination, which would encompass the issue of future dangerousness, was to take place. Additionally, the attachment of this right meant that appellant could have consulted with his attorney prior to the examination. There is nothing to

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[15] See White, n. 5 above, at 1542 regarding the obvious requirement that counsel meet with his client to discuss the proposed psychiatric interview vel non.

> indicate that appellant gave a knowing intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record.
>
> Opinion, p. 21. See also, Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977)

Then Associate Justice Rehnquist specifically noted this requirement in his concurring opinion in Estelle v. Smith, above at 475: "Counsel was entitled to be made aware of Dr. Grigson's activities involving his client and to advise and prepare his client accordingly." Thus, even if there is a disagreement about extending Miranda to these interviews--and we acknowledge that there may be based on the Justice's concurring opinion in Estelle [16] --the

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16/ See then Associate Justice Rehnquist's concurring opinion in Estelle v. Smith, above, at p. 475. See also in this regard, White, n. 5 above, at p. 1532.

petitioner's Sixth Amendment right to counsel clearly had attached in any event under the Estelle v. Smith holdings even as most narrowly interpreted.

It hardly seems necessary to mention in closing that this Court's recent opinion in Moran v. Burbine can be readily distinguished from this case because in Moran the right to counsel had not yet attached when the waiver and police "deception" of the attorney occurred. See Moran v. Burbine, 106 S.Ct. above at 1138, 1142. Here, on the contrary, the right to counsel had clearly attached when the disputed interview by Dr. Grigson took place.

## CONCLUSION

On the basis of the foregoing arguments and authorities, amicus curiae respectfully urges this Court to reverse and remand this case to the Texas Court of Criminal Appeals.

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